

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

IRISH 4 REPRODUCTIVE )  
HEALTH, ET AL., )  
Plaintiffs, )  
vs. ) 3:18-CV-491  
U.S. DEPARTMENT OF )  
LABOR, ET AL., )  
Defendants. )

TRANSCRIPT OF ORAL ARGUMENT ON MOTION TO DISMISS  
June 20, 2019

BEFORE THE HONORABLE PHILIP P. SIMON  
UNITED STATES DISTRICT JUDGE

# A P P E A R A N C E S :

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1 A P P E A R A N C E S (Continued):

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(The following proceedings were held in open court  
beginning at 10:07 a.m., reported as follows:)

3 DEPUTY CLERK: All rise.

4 THE COURT: Good morning, everyone.

5 You can be seated.

All right. We're on the record in Cause No. 3:18-CV-491.

7 Irish 4 Reproductive Health versus HHS, et al.

8 So why don't I have everybody introduce themselves so I  
9 know who we're dealing with here.

10 MR. KAIRIS: Matt Kairis for Notre Dame.

11 THE COURT: Good to see you again, Mr. Kairis.

12 MR. DICK: Anthony Dick for Notre Dame.

13 THE COURT: All right.

14                   **MS. KOPPLIN:**  Rebecca Kopplin for the federal  
15 defendants, Your Honor.

16 THE COURT: Okay.

17                   **MR. MACEY:** Jeff Macey for the plaintiffs,  
18 Your Honor.

19 THE COURT: Mr. Macey.

20 MS. GREEN: Carmen Green for the plaintiffs.

21 THE COURT: Okay.

22 MS. TANNER: Alison Tanner for the plaintiffs.

23 THE COURT: All right.

24 MS. BANKER: Michelle Banker for the plaintiffs.

THE COURT: You guys brought a whole load of people

1 here.

2 Mr. Kairis, I assume you'll be speaking for Notre Dame?

3 **MR. KAIRIS:** Actually, Anthony Dick will.

4 **THE COURT:** All right. Mr. Dick will. Okay.

5 Obviously, Ms. Kopplin, you'll be speaking for the federal  
6 defendants.

7 Who can I be talking to here -- so it would be Ms. Tanner,  
8 is it?

9 **MS. TANNER:** Yes. Michelle Bunker and Alison Tanner  
10 will be splitting the argument for the plaintiffs, Your Honor.

11 **THE COURT:** Okay. Fair enough.

12 You have given me a lot to digest here. It's an  
13 interesting case. I'll hear from Notre Dame first. I will  
14 give you as much time as you reasonably need, and then, you  
15 know, when I have heard enough, I'll tell you.

16 **MR. DICK:** Thank you, Your Honor. Anthony Dick for  
17 the University of Notre Dame.

18 So the only claim that names Notre Dame as a defendant in  
19 this case is a challenge to the settlement agreement, and it's  
20 our submission that the settlement agreement is unreviewable  
21 under *Heckler v. Chaney*, which generally bars judicial review  
22 of executive enforcement decisions; and, in particular, in this  
23 case, the settlement agreement that was reached between the  
24 government and the University of Notre Dame, along with a group  
25 of other plaintiffs in various lawsuits. The government in

1       that settlement agreement promised that it would not enforce  
2       the contraceptive mandate against the University.

3                   **THE COURT:** Why did the government settle the case?

4                   **MR. DICK:** The government settled the case for a  
5       number of reasons. Number one, to get rid of the claims that  
6       Notre Dame had brought against the government for a RFRA  
7       violation under the mandate. The government had actually lost  
8       a number of those cases.

9                   **THE COURT:** I thought the government won seven out of  
10      eight of them in the circuit courts.

11                  **MR. DICK:** That's right. The government -- there was  
12      a circuit split. The government had won seven out of eight,  
13      but the Supreme Court --

14                  **THE COURT:** It was the Eighth Circuit that had ruled  
15      and that's what prompted the appeal to the Supreme Court.

16                  **MR. DICK:** Well, that was one of the things that  
17      prompted the appeal, right. The Supreme Court granted cert  
18      after that circuit split developed. But then the Supreme Court  
19      had vacated all of the various circuit court decisions and  
20      remanded the cases, so the government, essentially, had a big  
21      mess on its hands with wide disagreement among lower courts.  
22      You had a number of permanent injunctions that had been entered  
23      by district courts in favor of various plaintiffs.

24                  The government had gotten its order from the Supreme Court  
25      in Zubik which effectively barred the government from enforcing

1 the accommodation against the plaintiffs while they had an  
2 opportunity to, basically, go back and work things out to try  
3 to find a solution that would satisfy both sides.

4           **THE COURT:** Right. I would understand why Notre Dame  
5 would want to, you know, settle the case. I don't understand  
6 why the government settled the case.

7           The overwhelming majority of the appellate courts had  
8 ruled that the RFRA claim was not a good one, and so why didn't  
9 they just reinstitute the accommodation and put it back in the  
10 lap of the Supreme Court to figure it out?

11           **MR. DICK:** Well, Your Honor, I suppose the government  
12 would be in a better position to answer that question than we  
13 would. I mean, from our perspective, we were quite confident  
14 in, ultimately, prevailing at the Supreme Court. In  
15 particular, after Justices Kavanaugh and Gorsuch joined the  
16 bench, because they were both on record as circuit judges  
17 joining or authoring opinions saying that the accommodation was  
18 a violation of RFRA, Justice Kavanaugh, then Judge Kavanaugh in  
19 the D.C. Circuit, wrote a dissent from the denial of en banc  
20 rehearing in *Priests for Life*, and then Judge Gorsuch joined a  
21 dissent from denial in the Tenth Circuit case taking the same  
22 position.

23           I understand Your Honor reached a different conclusion.

24           **THE COURT:** Well, on a very thin preliminary record  
25 too.

1                   **MR. DICK:** Sure. Right.

2                   **THE COURT:** To be fair.

3                   **MR. DICK:** That's right.

4                   And so I think all of that just goes to the point that  
5                   there was a very sharp dispute. There were a number of courts  
6                   that had gone different ways. To be sure, the circuits were  
7                   lopsided seven to one; but from the government's perspective,  
8                   they had these claims out there. They had the risk of  
9                   attorney's fees in a lot of cases. They had, you know, just  
10                  uncertainty that a lot of parties needed to deal with, and I  
11                  think from their perspective they wanted to conclude these  
12                  claims. They had promulgated a new rule which they could have  
13                  argued may have mooted out some of the challenges, but there  
14                  would have been a fight about mootness, about whether these  
15                  claims were capable of repetition --

16                  **THE COURT:** How is the settlement agreement being  
17                  fair to the mandate of the Supreme Court to, essentially, try  
18                  to preserve, you know, healthcare for women and under these  
19                  circumstances? It seems like it's a total abdication of that.

20                  **MR. DICK:** Well, Your Honor, we think that the  
21                  Supreme Court's order was to give the parties an opportunity to  
22                  go back and find a compromise that would satisfy all sides, and  
23                  the government took the position that such a compromise was  
24                  impossible because of the nature of the statutory mandate. It  
25                  actually required the provision of this coverage in connection

1 with health plans.

2       The plaintiffs, and I was part of the team that had  
3 briefed the case in the Supreme Court in Zubik and various  
4 other cases, was part of the settlement negotiations, and the  
5 plaintiffs felt very strongly that the regulatory methods that  
6 the government was trying to use were insufficient to provide  
7 the kind of separation from the coverage that they believed  
8 their religious views required.

9       And as a result of that, the government said it couldn't  
10 reach a compromise, so it had to choose one side or the other.  
11 And in this case, it chose to err on the side of protecting the  
12 religious liberty of the plaintiffs who were involved. We  
13 think that was certainly a fair and reasonable resolution at a  
14 time when there was a serious question about whether RFRA  
15 prohibited the enforcement of the accommodation.

16           **THE COURT:** All right. I mean, it would have been  
17 just as easy to -- I guess these are more questions for the  
18 federal defendants -- but to just require the Supreme Court to  
19 make a decision on it, right?

20           **MR. DICK:** Well, I think --

21           **THE COURT:** Other than collapsing and paying Jones  
22 Day a bunch of money and making Notre Dame whole, essentially.  
23 I mean, it was a total collapse.

24           **MR. DICK:** Well, with respect, Your Honor, it wasn't  
25 a total collapse in the sense that the new administration that

1 came in had a choice about whether it was going to require  
2 contraceptive coverage as part of the mandate at all. And  
3 there were many people who were urging the new administration  
4 to take the position, because, remember, Congress did not  
5 define what preventative care means. It left it up to  
6 executive discretion.

7 So the new administration came in and many people were  
8 urging it to redefine preventive care, as it, obviously, would  
9 have had authority to do, to not include controversial  
10 contraceptives, including some that many consider to be  
11 abortion-inducing drugs. Instead, the new administration  
12 decided that it would keep that definition in place.

13           **THE COURT:** What else can preventive care be? I  
14 mean, is it --

15           **MR. DICK:** Preventive care all across the board.

16           **THE COURT:** Across the --

17           **MR. DICK:** Cancer screenings, all kinds of things.  
18 Congress, I would submit, probably could not have enacted a law  
19 that would have specifically referenced contraceptive coverage  
20 in it, so they punted on that to the administration.

21           But my only point is the new administration kept that  
22 mandate in place. It estimated that the religious exemption  
23 would apply to fewer than .1 percent of women who would be  
24 affected by employer-based coverage, so 99.9 percent of  
25 employers throughout the country continued to be covered. It's

1       only a very narrow slice of employers that actually objected to  
2       this on religious grounds.

3           I think the administration decided that for that very  
4       small portion of employers who have sincere conscience-based  
5       objections, in a diverse and pluralistic society, there are  
6       other employers, there are other universities, that people have  
7       a right to go to. There is room in a diverse and pluralistic  
8       society for a very tiny portion of employers and universities  
9       like Notre Dame where they can be out from under the heel of  
10      this federal mandate.

11           And, you know, there's a natural sorting. It's a free  
12       society. People can decide to go to other universities. They  
13       can decide to go to other employers, and all we're asking for,  
14       and the administration decided to grant, is in this very  
15       small -- it's a minority religious view these days; and in a  
16       very small circumstance, we're going to allow some diversity,  
17       we're going to allow some people that have an exemption, rather  
18       than putting them to the choice of violating their religious  
19       beliefs or facing severe penalties.

20           **THE COURT:** But when, you know, the White House  
21       changed and the view of what preventive care, you know, might  
22       mean, is it not true that the agency that was tasked with  
23       deciding what that means came up with a laundry list of  
24       services that needed to be covered? Did those remain the same?

25           **MR. DICK:** I believe they did, Your Honor.

1       Certainly --

2                   **THE COURT:** Based on the Institute of Medicine's  
3 evaluation?

4                   **MR. DICK:** Correct.

5                   **THE COURT:** What's the name of that agency, HR  
6 something?

7                   **MR. DICK:** Yeah, the Health Resources Services  
8 Administration, I believe, HRSA. The government will correct  
9 me if I'm wrong with respect to the precise acronym. I think  
10 she's indicating that I have it right.

11                  They, of course, you know, have discretion based on a  
12 number of factors under *Chevron* to decide what preventive  
13 services mean. The new administration decided to reach this  
14 compromise position where it would keep the mandate in place  
15 for almost every employer in the country, 99.9 percent, and  
16 only create this very narrow religious exemption.

17                  And the plaintiffs have tried to portray this as depriving  
18 women nationwide of coverage. We think it is quite a  
19 reasonable and narrow compromise that applies in very limited  
20 circumstances.

21                  **THE COURT:** But any employer can opt for it.

22                  **MR. DICK:** Only if the employer has sincere religious  
23 or moral objections, which is quite a small universe of  
24 employers.

25                  **THE COURT:** How do you know that?

1                   **MR. DICK:** Well, we know that because of the number  
2 of people who brought claims, who brought RFRA claims, and who  
3 have sought to take advantage of the exemptions that exist, the  
4 regulatory exemptions. There is just a very, very small  
5 number.

6                   The government in the final rules that they promulgated  
7 discussed their estimate, and I think they have been reasonably  
8 accurate with that. The government can speak more to, perhaps,  
9 how they got to that estimate, but I don't think the plaintiffs  
10 have disputed that that's a very small, very small number.

11                  **THE COURT:** So your position is, and maybe you can  
12 flesh this out for me on the settlement agreement, that I don't  
13 really need to get to that issue unless I find that the rules  
14 have been promulgated improperly? Can you flesh that out for  
15 me?

16                  **MR. DICK:** That's right, Your Honor.

17                  So we think, basically, and we have argued this in terms  
18 of prudential ripeness, that the Court would have discretion to  
19 manage its docket and to say, "Look, as long as there are  
20 regulations that exempt the University from the mandate, then  
21 the settlement is a moot point," because the settlement just  
22 says, "We're not going to enforce any regulations that may  
23 apply." There are currently no regulations that apply as long  
24 as the regulatory exemption remains in place. So we think the  
25 most sensible course of action would be to wait until that

1 regulatory dispute is fully resolved.

2 As Your Honor pointed out, the Supreme Court is probably  
3 going to have to answer this at the end of the day. We think  
4 that could happen by the end of next term. Again, we feel  
5 quite confident that the regulations, the exemption, will be  
6 upheld.

7 And I would just point out, late last week, something I  
8 just found out about, there has now been a nationwide  
9 injunction issued by the Northern District of Texas prohibiting  
10 the enforcement of the accommodation -- prohibiting the  
11 government from enforcing the accommodation, so that's a case  
12 call *Deotide*. I have a copy.

13 **THE COURT:** Say that again. So I know there's the  
14 nationwide injunction in Philadelphia, I think it was.

15 **MR. DICK:** Correct.

16 **THE COURT:** Somewhere in the Third Circuit.

17 **MR. DICK:** Right.

18 **THE COURT:** And then there's a regional injunction  
19 out of the Ninth Circuit.

20 **MR. DICK:** That's right, Your Honor.

21 **THE COURT:** Are you saying the injunction in Texas is  
22 the opposite --

23 **MR. DICK:** Yes.

24 **THE COURT:** -- of the injunction in --

25 **MR. DICK:** Essentially, yes.

1           So the injunction issued by the Northern District of Texas  
2 late last week, and the case is called *Deotide*, D-E-O-T-T-E -- I  
3 have a copy of the opinion if Your Honor would like to see  
4 it -- the judge there certified a nationwide class of employers  
5 who object to the accommodation.

6           And the reason that was a live dispute is because you had  
7 the nationwide injunction in Philadelphia striking down the  
8 exemption, so you had a defensive suit brought by objecting  
9 religious employers in Texas. And the judge there just granted  
10 this nationwide injunction in favor of the religious objectors  
11 saying, "Okay. If you're going to strike down the exemption,  
12 I'm going to enjoin," and did, enter permanent injunction  
13 against the accommodation. So you've now got -- it's a giant  
14 mess, Your Honor.

15           **THE COURT:** What a mess.

16           **MR. DICK:** And we think this underscores why the  
17 Supreme Court is likely to get involved. We think the Supreme  
18 Court is likely to say, "Enough is enough. The regulations are  
19 valid. The government has discretion not to enforce this  
20 against religious objectors."

21           **THE COURT:** So what is -- this settlement agreement,  
22 was it unique to just Notre Dame and HHS, or, as I understand  
23 it, there were 70 other similar settlement agreements?

24           **MR. DICK:** That's right. Well, not similar  
25 settlement agreements. There was this one settlement that was

1 entered between the government and 74, I believe it was,  
2 plaintiffs who had brought a number of suits. I mean, many of  
3 these suits --

4           **THE COURT:** This Exhibit A --

5           **MR. DICK:** Correct.

6           **THE COURT:** -- is this a global settlement --

7           **MR. DICK:** Correct.

8           **THE COURT:** -- of --

9           **MR. DICK:** Okay. And Exhibit B lists the cases that  
10 were brought to which those parties were plaintiffs.

11           **THE COURT:** I see.

12           So has anybody else challenged the settlement agreement in  
13 any of those other cases?

14           **MR. DICK:** Not to our knowledge, Your Honor.

15 Frankly, we think that's because it's quite obviously  
16 unreviewable under *Heckler*. These are the first plaintiffs who  
17 thought that a Court could possibly review the settlement,  
18 which is a nonenforcement agreement; so in our view, it's just  
19 clearly unreviewable.

20           The regulations, we agree, are challengeable in a proper  
21 case. When the government says it's not going to enforce a  
22 regulation against a named group of parties in a way of  
23 settling the claims those parties have brought, there's just no  
24 case ever where a Court has reviewed that kind of thing that  
25 we've found. And we just think under *Heckler* it's clearly

1 barred by Supreme Court precedent.

2                   **THE COURT:** So no other claim has been brought around  
3 the country challenging any of these other 73 --

4                   **MR. DICK:** Correct, not challenging the settlement as  
5 far as we are aware.

6                   **THE COURT:** You can continue.

7                   **MR. DICK:** Thank you, Your Honor.

8                   **THE COURT:** All right. Thank you, Mr. Dick.

9 Ms. Kopplin, I guess I'll hear from you now.

10                  **MS. KOPPLIN:** Thank you, Your Honor. So if it's all  
11 right with Your Honor, I'd like to start with the settlement  
12 agreement since that's where Mr. Dick just left off.

13                  **THE COURT:** Sure.

14                  **MS. KOPPLIN:** There's just a couple things that  
15 jumped out at me as you two were talking that I thought I would  
16 chime in on as we went.

17                  First, to the question of why the government settled these  
18 cases, I guess I have to temper your expectations. I don't  
19 know that much about that, and I'm not sure how much I could  
20 say on the record if I did, but I think the key point is that  
21 the decision of how to prioritize resources from litigation and  
22 when to settle cases is committed to the agencies, and that's a  
23 decision that the executive branch made in this case  
24 appropriately. That's not something -- we would agree with  
25 Notre Dame, that that should be unreviewable under *Heckler v.*

1       *Chaney.*

2              You also had mentioned the *Zubik* orders, and, of course,  
3       one of plaintiffs' main objections to the settlement agreement  
4       is that they believe it violates *Zubik*.

5              Similarly, reading *Zubik*, it's clear the Supreme Court is  
6       not mandating that any particular policy steps be taken. They  
7       do ask the parties be afforded an opportunity to solve their  
8       problems, and the agencies tried very hard to do this. As we  
9       described in our briefing, the agencies asked for public  
10      comments and actually reviewed more than 54,000 of them -- this  
11      is all during the prior Obama administration -- and ultimately  
12      concluding during that administration they just could not find  
13      a way to satisfy both sides completely, but it certainly was  
14      not --

15             **THE COURT:** What was wrong with the accommodation  
16      paradigm that was set up before? I mean, eight circuits had  
17      agreed with the government that this wasn't a violation of RFRA  
18      and things were going great for the government in the  
19      litigation. So why did they give up the ghost? I mean, it's  
20      mystifying to me.

21             **MS. KOPPLIN:** Again, I'm just speculating because I  
22      don't have anything to say about that in particular. I think  
23      you're referencing that there was circuit court decisions. In  
24      the district courts, the record was much more mixed than that.  
25      The Supreme Court had not definitively ruled on this question

1 of whether or not there are entities that are substantially  
2 burdened by the accommodation.

3 We now take the position that there are such entities, and  
4 that's something the Supreme Court was explicitly avoiding  
5 deciding in *Zubik*. I think the Supreme Court recognizes this  
6 is a very difficult question. I mean, to be frank, Your Honor,  
7 if the Supreme Court had a specific policy in mind, they  
8 probably would have ordered the parties to do it. They kind of  
9 gave this punt to say go back and look at it yourselves because  
10 they were hoping the parties were going to work it out because  
11 of the difficulty of these issues.

12           **THE COURT:** Right. But things would have been a lot  
13 easier if the government had just stuck with the original  
14 regulation and forced the issue with the Supreme Court and got  
15 an answer, right? Instead, you just collapsed on it and gave  
16 the plaintiffs in all of those cases exactly what they wanted,  
17 and paid their lawyer fees.

18           **MS. KOPPLIN:** I mean, respectfully, Your Honor, I  
19 guess I'm not sure if there's much more I can say about that.  
20 The government's taken the position now that it feels is  
21 correct.

22 One thing I wanted to note on this question of -- I know  
23 you spoke a lot with Mr. Dick about how the number of employers  
24 affected is actually likely to be small and you were asking how  
25 do we know it is going to be small. This is in the rules, and

1 I'm sure you've read that, sort of the government's predictions  
2 of how many people would be affected.

3 I just wanted to also point out the reason we expect it to  
4 be small is because there's no financial incentive to opt out.  
5 It seems people generally understand that paying for  
6 contraceptives might even be cheaper than paying for, sort of,  
7 postpartum and prepartum care. So financially there's not  
8 going to be a big drive here that people will be opting out  
9 just for fun or because they want to save money somehow, so we  
10 don't really expect people would have any incentive to opt out  
11 unless they had a sincere religious objection.

12 So going to *Heckler*, and this is sort of addressing Count  
13 1, which is plaintiffs' attempts to challenge the settlement  
14 agreement under the APA, as Notre Dame alluded to, this is a  
15 decision that's been committed to the agency's discretion. And  
16 that's for all the same reasons the Supreme Court was relying  
17 on in *Heckler*, the fact that there's limited enforcement  
18 resources agencies have, the fact that they have to prioritize  
19 those decisions, and the fact this is akin to prosecutorial  
20 discretion.

21 And as we mentioned in our briefing, there's a number of  
22 cases that hold that a nonenforcement settlement agreement is  
23 basically the same as a nonprosecution agreement in terms of  
24 *Heckler v. Chaney*.

25 I would like to also briefly address Count 2, which is

1 where the plaintiffs have sort of raised this common law  
2 illegality challenge to the settlement agreement. As we  
3 mentioned in our briefing, there's a number of procedural  
4 issues with this. And in many ways, it collapses with the  
5 merits of the final rules.

6 So I'll just point out, in addition to the problems with  
7 Zubik I mentioned, it's especially odd that plaintiffs think  
8 that their same constitutional challenges and ACA challenges  
9 apply to the settlement agreement.

10 For example, plaintiffs identify nothing the ACA that  
11 would tell the agencies when they have to take enforcement  
12 action. There's nothing in there that says, HHS, here is how  
13 you're going to decide which agencies you're going to  
14 prioritize. So it's not clear how a decision to settle a  
15 lawsuit could violate the ACA in that sense.

16 It's also not clear to me how, for example, plaintiffs'  
17 equal protection claims that they raise against the final rules  
18 could apply to the settlement agreement. A settlement  
19 agreement, by its nature, is about a discrete group of people.  
20 Here it's about the parties and the case the government was  
21 settling. It's not a classification that sort of cuts, you  
22 know, generally across the population the way the  
23 classifications are analyzed under the Equal Protection Clause.  
24 So I think that when you're looking at that, it's just  
25 important to be very careful to separate those things out.

1           I'd also like to briefly address plaintiffs' claims which  
2 they have added in their opposition that are not in their  
3 amended complaint that the settlement agreement violates  
4 internal DOJ guidance that they cite to in the opposition.

5           As we mentioned in our briefing, this is not legally  
6 binding. That guidance does not create a legal effect on  
7 anyone. So this is not the kind of thing that something could  
8 be void for illegality even if it did violate it; and on its  
9 terms, the settlement agreement is completely in compliance  
10 with that guidance. The guidance says everything else it says  
11 and then it says, "And this is something that should be  
12 interpreted with the discretion and the Attorney General can  
13 make exceptions as litigation calls for it." So this is not a  
14 situation where there has been a violation.

15           Finally, I think this is kind of just the direction the  
16 plaintiffs are taking us down, is this idea that they want to  
17 come into court and have judges be looking at DOJ's internal  
18 policy memos and asking if DOJ has correctly applied them in  
19 making every decision at whether to settle every piece of  
20 litigation, and that's not something that's been happening  
21 historically, and we would take the position that that's not  
22 something that the Court should do.

23           **THE COURT:** You don't need to say anything more about  
24 that.

25           **MS. KOPPLIN:** Thank you, Your Honor.

1           Unless you have further questions about the settlement  
2 agreement, I would like to talk about the final rules.

3           **THE COURT:** Sure.

4           **MS. KOPPLIN:** So, first, on the question of whether  
5 or not the final rules are procedurally proper, I think the  
6 first key point is that we're only looking now at the final  
7 rules. This is a -- plaintiffs are seeking prospective relief.  
8 Only the final rules are now in effect. So whatever happens to  
9 the plaintiffs in the future is going to happen because of the  
10 final rules, not the IFRs, and any relief that this Court could  
11 give would only be relief that could change the final rules.

12           **THE COURT:** Aren't the final rules tainted by what  
13 took place prior to that?

14           **MS. KOPPLIN:** No, Your Honor.

15           **THE COURT:** Why not?

16           **MS. KOPPLIN:** That's for several reasons.

17           First -- I just want to put this at the front level.  
18 Plaintiffs' taint theory would effectively prevent the  
19 government from ever being able to go back and make any rule in  
20 this area. And that just can't be right, that if the  
21 government did error once and issue a rule without proper  
22 notice and comment, there's some kind of a subject matter ban  
23 where now the government can never issue a rule about religious  
24 exemptions for contraception. That just can't be the case.

25           So that leads us to the question of, okay, so how should

1 the government then act to cure a problem with notice and  
2 comment. The answer is, the government should go back and it  
3 should do notice and comment. And then after that notice and  
4 comment, it should issue a new rule. And that's exactly what  
5 happened here.

6           **THE COURT:** Why do they issue these interim rules?  
7 This is not something I deal with very often, so you need to --  
8 what was the point of the IFRs? Why not just do it the way you  
9 are supposed to do it?

10           **MS. KOPPLIN:** Well, sure, and they did do that  
11 eventually.

12           **THE COURT:** I understand that, but for the year that  
13 the IFRs were in the place -- just take it out of the context  
14 of this case. Educate me on that process because I don't  
15 understand it. Is that a common thing?

16           **MS. KOPPLIN:** In this context, it is very common.  
17 The IFRs are -- sorry. IFRs is also the process that past  
18 administrations used to issue the past exemptions here, so the  
19 initial exemption for churches and their integrated  
20 auxiliaries, that was done by the Obama administration as an  
21 IFR. So it's not something that's unusual or rare in this  
22 particular context.

23           So the reason for that is that the ACA actually gives  
24 statutory authority to the agencies to issue interim final  
25 regulations that may be necessary to carry out the mandate, and

1       that's 42 U.S.C. § 300gg-92. So that's a specific provision  
2       relating to the ACA.

3           In addition, the APA, in general, says that agencies can  
4       issue IFRs, so it can skip doing notice and comment first when  
5       there's good cause. And so this is in 5 U.S.C. § 553(b)(3)(B)  
6       and in 553(d)(3). There's two different possible definitions  
7       of good cause. So one is whenever it would be impractical,  
8       unnecessary, or contrary to the public interest to do a notice  
9       and comment first, and the other is a little bit broader than  
10      that.

11           So as we've explained in our briefing, the reason the  
12       agency did the IFR originally was because they had the  
13       statutory authority and they wanted to resolve the litigation  
14       and bring clarity sooner to that. Now, I do know that other  
15       Courts have disagreed that that was correct. So to sort of do  
16       a belt-and-suspenders approach, the agencies then went back and  
17       took comments and issued the final rules after those comments.

18           So the IFRs also are explicitly asking for comments. In  
19       the IFRs, it says, "This is an interim final rule with a  
20       request for comment. Here is how you submit your comments.  
21       Here's how long we will be taking comments for." So the agency  
22       had thought about that up front. They ultimately received  
23       about 110,000 comments they considered.

24           **THE COURT:** To the IFRs?

25           **MS. KOPPLIN:** To the IFRs. And those are the

1 comments they considered and responded to when they issued the  
2 final rules. I will even note that --

3           **THE COURT:** But the final rules are pretty much  
4 identical to the IFRs, correct?

5           **MS. KOPPLIN:** They're pretty similar. There were  
6 some clarifications made where people would have comments and  
7 say, "This is unclear to us," and they would kind of clarify,  
8 "This is what we meant." I wouldn't say there was any  
9 groundbreaking changes.

10          And plaintiffs in their brief kind of suggest, "Oh, that  
11 shows that the agencies weren't taking the comments seriously  
12 if they didn't make a complete about-face." But that's not the  
13 standard.

14          The APA says the agencies have to consider it and they  
15 have to explain their reasons. There's no requirement that  
16 they have to agree with any particular comment. And in this  
17 case, they just didn't agree with those comments.

18          And the Seventh Circuit has addressed the question of how  
19 open an agency's mind would be, and it did that in the *U.S.  
20 Steel Corp.* case that we mention in our briefing. So they  
21 are -- just like here, the EPA listed a list of non-attainment  
22 areas without doing notice and comment first. It issued an  
23 interim list, and then it took comments on that list and then  
24 it issued a final list.

25          And so the Seventh Circuit considered this question of,

1 "Well, was the agency's mind open when it took those comments  
2 even though it had already done its interim action?" It  
3 concluded that there was no reason to think the agency's mind  
4 wasn't open. It said, "Look, we looked at what the final rules  
5 said. They considered the comments and responded to them.  
6 There's no reason for us to think it would have responded  
7 differently if it had done it in the other order, so that's  
8 fine."

9 So applying that same logic here, the agencies have taken  
10 the 110,000 comments and they have responded to them. In fact,  
11 I believe the Court in California even concluded on the second  
12 go-around of the final rules that there was no reason to think  
13 the agencies hadn't adequately considered the comments and now  
14 the agencies have issued the final rules.

15 **THE COURT:** Did these rules supersede the prior  
16 rules, the so-called accommodation?

17 **MS. KOPPLIN:** I believe so. I'm sorry. They  
18 superseded the IFRs. The accommodation is still an option for  
19 people who want to use it.

20 **THE COURT:** If the Third Circuit affirms that  
21 nationwide injunction and deems the current regulations were  
22 improperly promulgated, does the old paradigm just go back into  
23 place or has that been erased by the actions with these new  
24 regulations? Do you understand what I'm getting at?

25 **MS. KOPPLIN:** I think you're asking if the exemption

1 for church and their integrated auxiliaries and the  
2 accommodation process still exists, and I think they do either  
3 way. The final rules don't try to write those out.

4                   **THE COURT:** They are voluntary at this point.

5                   **MR. KAIRIS:** Under the final rules, yes. I think if  
6 the final rules don't exist --

7                   **THE COURT:** What I'm saying is would they be  
8 mandatory if it's found that the rulemaking was improper on the  
9 ones that are under consideration here?

10                  **MS. KOPPLIN:** I mean, I think it would depend exactly  
11 what the Third Circuit's order said. But my understanding is  
12 if the Third Circuit just said, "We're going to vacate the  
13 final rules," then it would go back to how it was before the  
14 final rules were, barring any other judicial opinions that may  
15 have, you know, held otherwise or led to some kind of contrary  
16 position.

17                  **THE COURT:** What's the status of that Third Circuit  
18 case; it's been argued?

19                  **MS. KOPPLIN:** It was just argued a few weeks ago, I  
20 think, Your Honor.

21                  **THE COURT:** Okay. And the Ninth Circuit case was  
22 just argued on Friday?

23                  **MS. KOPPLIN:** Correct.

24                  **THE COURT:** I had a chance to watch -- you can watch  
25 the videos of the Ninth Circuit arguments. I had a chance to

1 watch that.

2           **MS. KOPPLIN:** It's pretty cool.

3           **THE COURT:** Yeah, it is really cool, isn't it? It's  
4 very helpful to be able to do that.

5           It's very hard to read the tea leaves about what's going  
6 to happen, but my strong sense is that the Ninth Circuit's  
7 going to defer to what the Third Circuit does, in the sense of  
8 just stand down until the Third Circuit decides what it wants  
9 to do.

10          But if the rules are set aside, then we just go back to  
11 what it was under when Notre Dame came to this Court five years  
12 ago, is that right?

13          **MS. KOPPLIN:** I mean, like I said, I think it depends  
14 exactly what the orders say, because we've had some confusion,  
15 but that's my understanding, is that, if the Third Circuit  
16 says, "We're going to vacate these IFRs," then the  
17 accommodation still exists. It came from a different IFR,  
18 right. The exemption still exists. And, again, that's setting  
19 aside anything other Courts may be doing to the contrary.

20          I know counsel from Notre Dame mentioned this *Deotte* case.

21          **THE COURT:** Right.

22          **MS. KOPPLIN:** So I guess unless you have further  
23 questions about the procedural issues, I would like to move to  
24 the merits of the final rules.

25          **THE COURT:** Sure.

1                   **MS. KOPPLIN:** So there's two main arguments here.  
2 One is that the final rules are authorized by the Women's  
3 Health Amendment in the ACA; they are completely in harmony  
4 with it. And two is that they are both authorized and required  
5 by RFRA. So I'll start with the Women's Health Amendment.

6                   In the ACA, the Women's Health Amendment requires that  
7 HRSA set up comprehensive guidelines to describe what  
8 additional preventative care and screenings for women will be  
9 covered. And there's a couple references in this section.

10                  And this is 42 U.S.C. § 300gg-13(a)(4).

11                  **THE COURT:** Got it here.

12                  **MS. KOPPLIN:** There's a couple references in this  
13 section that suggest that HRSA is getting quite a bit of  
14 discretion to make decisions here. So first is the fact that  
15 it's referring to comprehensive guidelines, and those  
16 guidelines don't exist yet. So Congress knows that HRSA is  
17 going to make them up.

18                  Two, so broad that Congress hasn't even said, "You have to  
19 cover contraception." Like, that's kind of the level of  
20 generality that HRSA is operating at.

21                  Three, as we mention in our briefing, this provision  
22 doesn't say that it has to be evidence-based or  
23 evidence-informed, even though other provisions do limit HRSA  
24 that way, to being evidence-based or evidence-informed -- I'm  
25 sorry -- not HRSA or whoever the appropriate decision-maker

1 would be.

2       Fourth, this provision says that the regulation should be  
3 as provided for by HRSA, suggesting that HRSA has the  
4 discretion to select not just the services to be covered but  
5 also the manner in which those services be provided and who  
6 will provide them.

7           **THE COURT:** So did HRSA change its mind prior to the  
8 issuance of the new regulations -- rules?

9           **MS. KOPPLIN:** My understanding is that HRSA is a  
10 subsidiary of HHS, so HRSA kind of -- whatever the secretary of  
11 HHS says, he has authority over HRSA, so HRSA, you know, is in  
12 line with --

13           **THE COURT:** Just by fiat he can -- I mean, doesn't  
14 this direct HRSA to do a full-blown study and figure out what  
15 should be in this pot and what shouldn't be? And they did  
16 that. And did they redo that before issuing these new rules?

17           **MS. KOPPLIN:** I think what happened is just what's  
18 described in the rules themselves, here was the process that  
19 was followed.

20           **THE COURT:** So the answer is no, really. They didn't  
21 go back to the Institute of Medicine and ask for a  
22 re-evaluation or anything like that, just somebody in  
23 Washington changed their mind.

24           **MS. KOPPLIN:** Well, I will point out -- again --

25           **THE COURT:** Is that right?

1                   **MS. KOPPLIN:** I don't have any information about that  
2 other than what's in their rules. So what I'm telling you  
3 happened, I guess, is -- what is in their rules is what  
4 happened.

5                   **THE COURT:** And nothing in the rules suggest that  
6 HRSA as an agency with the assistance of the Institute of  
7 Medicine, or whatever it's known by now, did -- changed their  
8 view of what should go in this pot of preventative care?

9                   **MS. KOPPLIN:** Well, I mean, again, HRSA is a  
10 component that answers to HHS; so to the extent that HHS takes  
11 a position, I don't know if we can separate out if HRSA has  
12 taken that position or not.

13                  **THE COURT:** But the statute directs HRSA to do that,  
14 not HHS writ large. Does that matter?

15                  **MS. KOPPLIN:** I don't think it does. I don't know  
16 that plaintiffs have advanced any arguments on this point.  
17 But, again, we take the position that HRSA is just a component  
18 of HHS that answers to HHS.

19                  And this is also the same way -- again, going back in  
20 time, this is the same way this has been done previously by  
21 past administrations to make the initial exemption for churches  
22 and their integrated auxiliaries and the accommodation, which I  
23 understand plaintiffs do not object to and yet --

24                  **THE COURT:** Slow down.

25                  **MS. KOPPLIN:** Sorry.

1           So that's the same process that led to both of those. I  
2 don't understand plaintiffs to object to those, so it seems  
3 strange to now just object because they don't like the content  
4 of this third iteration.

5           **THE COURT:** But they didn't object to them because it  
6 was after a comprehensive study that was done by HRSA.  
7 Whereas, here, it doesn't seem like there was any of that. It  
8 was just flip the switch and change the policy.

9           **MS. KOPPLIN:** I'm sorry, Your Honor. So I understand  
10 that HRSA did do a study to arrive at the list of  
11 contraceptives, but I was referring to when the initial  
12 exemption for churches and their integrated auxiliaries went  
13 into effect.

14           I don't know that HRSA went back and did research on the  
15 issue of churches and their integrated auxiliaries and did a  
16 study on that point. I don't know that HRSA did a similar  
17 study on the accommodation either on the effect of letting this  
18 be provided -- you know, through the third-party administrators  
19 and the issuers.

20           And, finally, in this entire realm of the Women's Health  
21 Amendment, this is HHS's statute to interpret. They have the  
22 expertise here, and we argue that they are entitled to *Chevron*  
23 deference, which means that plaintiffs have to show not just  
24 that their reading is a sensible reading but that our reading  
25 is, in fact, foreclosed by the statute, which in light of the

1 past practice in this area I don't know how it could be  
2 foreclosed by the statute.

3 If you don't have further questions on the ACA, I would  
4 like to address RFRA.

5 **THE COURT:** (Nodding.)

6 **MS. KOPPLIN:** Thank you, Your Honor.

7 So RFRA is a generalized statute, all right, a background  
8 norm for the federal government. It tells the federal  
9 government it cannot substantially burden a person's exercise  
10 of religion unless the application of that burden to that  
11 person is the least restrictive means of further and compelling  
12 government interest. So we kind of have two arguments here  
13 I'll just lay out before I get into them.

14 In *Hobby Lobby*, the Supreme Court did identify a  
15 substantial burden on nonprofit corporations like Hobby Lobby,  
16 in that it found that it was substantial because the size of  
17 penalties the ACA imposed were so large.

18 So, first, our position is that in light --

19 **THE COURT:** That was mandating contraception by the  
20 employer, by the employer's plan, right?

21 **MS. KOPPLIN:** Correct.

22 **THE COURT:** And, you know, that's a reasonable  
23 decision that, of course, that substantially burdens somebody's  
24 exercise of their religious beliefs. But the Notre Dame case,  
25 by way of example, is just a completely different kettle of

1 fish. They weren't requiring them to include it in their  
2 health plan.

3 **MS. KOPPLIN:** So I think that the logic of *Hobby*  
4 *Lobby* actually dictates that Notre Dame is also substantially  
5 burdened. *Hobby Lobby* is very --

6 **THE COURT:** How is that?

7 **MS. KOPPLIN:** *Hobby Lobby* says we can't second-guess  
8 these individuals. It's not for the Court to try and draw a  
9 line and tell them if their practice, you know, really is what  
10 their practice is. So when an entity says, "It substantially  
11 burdens my religious practice to be complicit in this process  
12 where I submit this form and later contraceptives are provided  
13 through my plan," we can't be second-guessing if that really  
14 isn't a violation of religious belief or not.

15 **THE COURT:** That's what they were doing prior to the  
16 accommodation.

17 **MS. KOPPLIN:** I'm sorry. That's what --

18 **THE COURT:** They were telling employees, "We don't  
19 cover this." And now they're just telling the federal  
20 government, "We don't cover this."

21 **MS. KOPPLIN:** I mean, again, I don't --

22 **THE COURT:** How is that -- I don't understand that.

23 **MS. KOPPLIN:** I am not an objector, so I don't know  
24 if I could explain it to you. But I'm saying that if there are  
25 people, which I understand there are, who say, "Providing this

1 form to the government to lead -- to start this process, this  
2 violates my religious beliefs," the Supreme Court in *Hobby*  
3 *Lobby* told us it's not for Courts to try and draw that line and  
4 say, "This seems really similar to the other notice you used to  
5 be giving," to me.

6                   **THE COURT:** In *Hobby Lobby*, Hobby Lobby as a  
7 corporation did not want to provide on their dime contraceptive  
8 services. Good on them. That's their business. That's not  
9 what we're talking about here.

10                  **MS. KOPPLIN:** So just to clarify. So our first  
11 argument is that in *Hobby Lobby* that was the substantial burden  
12 identified, the one on those for-profit corporations. At the  
13 time, the agencies had chosen to respond to that burden through  
14 the accommodation. They said, "Look, we made this  
15 accommodation, here is what you can do."

16                  And our position is that that was a permissible response  
17 under RFRA but also that the agencies have leeway under RFRA to  
18 make a reasonable response and that they can now say, "Okay, we  
19 previously chose to meet that substantial burden of the  
20 accommodation, but now we are going to take the more  
21 straightforward path and just create the exemption instead.  
22 The accommodation was a bit convoluted, people were having  
23 problems with it. To meet that same substantial burden,  
24 instead of using the accommodation, we'll leave that as an  
25 option, but we're also just going to create a broader

1 exemption."

2       And our second argument is that, as I just alluded to,  
3 under the logic of *Hobby Lobby*, there is an additional  
4 substantial burden on different entities to participate in the  
5 accommodation process, and the final rules are an appropriate  
6 response to alleviate that substantial burden.

7           **THE COURT:** What's that substantial burden?

8           **MS. KOPPLIN:** So this would be on entities who  
9 believe that participating in the accommodation process is a  
10 violation of their religion. And *Hobby Lobby* said that the  
11 substantiality, at least, is not in question. Once it's  
12 established that their religious beliefs have been violated, we  
13 know it's a substantial burden because the burden is this  
14 threat of penalties under the ACA, that, as the Court noted in  
15 *Hobby Lobby*, it's an easy call that's substantial because the  
16 magnitude of the penalties is just so large.

17           **THE COURT:** So this is under the paradigm of them  
18 filling out the form and sending it in to HHS?

19           **MS. KOPPLIN:** Correct.

20           **THE COURT:** Okay.

21           **MS. KOPPLIN:** So that's the two ways that we've  
22 structured this.

23           And to go further, the agencies correctly concluded in  
24 their rules that the accommodation was not the least  
25 restrictive means of serving any compelling government

1 interest, and they lay this out at some length. But the short  
2 version is that it's hard to show a compelling interest when  
3 there's already many other exemptions. And there were already  
4 a number of entities that did not have to provide  
5 contraception, so there's all of the grandfathered plans, which  
6 is, I think, about 25 million people when the ACA was enacted,  
7 is the other past exemptions for churches and their integrated  
8 auxiliaries, there's the accommodation, and to weigh against  
9 that, there's the fact that many women do have access to  
10 contraception through other sources, through perhaps someone  
11 else's plan, parents' plan, their spouse's plan, through a  
12 state, federal, or local program or perhaps even if they happen  
13 to have an employer who objects, their employer may not object  
14 to the contraception that they want.

15 Most objecting employers -- well, I guess, many objecting  
16 employers only object to some of the methods. So, for example,  
17 here, I think there's only a handful that Notre Dame objects  
18 to, and the others they don't object to.

19 So in light of that, the agencies re-evaluated the  
20 administrative record and concluded that there was no reason to  
21 believe that the accommodation was the least restrictive means  
22 of serving a compelling government interest.

23 And furthermore, I mean, as we pointed out in our  
24 briefing, the government here is not taking the position that  
25 it is a compelling government interest, and we're not aware of

1 cases where Courts have sort of told the government what their  
2 interest was over the government's objection.

3 Once a burden has been established, RFRA doesn't prescribe  
4 the precise remedy that the agencies have to take to fix that  
5 burden. So RFRA -- the agencies here chose to put in place the  
6 accommodation first in the prior exemption, but there's nothing  
7 that told them in RFRA they had to do that specific thing.

8 And, in fact, that choice led them into a long morass and  
9 decades of litigation, which is how we're still here today.  
10 We've been here for years. We are still here today. Our  
11 position is that's why the agencies should be entitled to a  
12 little bit of leeway, instead of being told under RFRA there's  
13 one exact thing you can do in RFRA, you have to hit that  
14 bullseye, or otherwise you have to just keep incrementing one  
15 step at a time and getting sued every step and one day finally  
16 the Court will tell you, "Okay. This is the exact magic step  
17 where you can stop."

18 I mean, it's our position that the agencies should be able  
19 to short-circuit that process by saying, "Okay. Look, we know  
20 this was a substantial burden. Here is our reasonable approach  
21 to solving that. Even if it wasn't the one exact path that was  
22 preordained, this is something we should have the leeway to do  
23 to try and help people have the substantial burdens  
24 alleviated."

25 Unless there's further questions about RFRA, I would like

1 to address plaintiffs' constitutional claims.

2           **THE COURT:** Sure.

3           **MS. KOPPLIN:** So just briefly, starting with the  
4 Establishment Clause, plaintiffs appear to be arguing that the  
5 final rules in the settlement agreement, to some extent,  
6 establish religion. That's just not the case. There's  
7 numerous Supreme Court cases that state that there's room in  
8 between the Establishment Clause and the Free Exercise Clause  
9 where the government can accommodate religion.

10           And we think this is a lot like the *Amos* case where the  
11 government found that it was okay to exempt religious employers  
12 from Title VII restrictions on hiring and firing and that that  
13 was just going to be alleviating a government burden on the  
14 employers and not entangling the government in religion.

15           So similarly here, the government is not affirmatively  
16 directing anyone to do anything. Instead it's just alleviating  
17 a burden on some of these employers and letting them go ahead  
18 and act in accordance with their religious beliefs. So for all  
19 the same reasons that applied in *Amos*, this would satisfy the  
20 *Lemon v. Kurtzman* test and not violate the Establishment  
21 Clause.

22           In addition, on due process, plaintiffs make two  
23 arguments, one about the fundamental right to access  
24 contraceptives and one about a liberty interest. But they both  
25 fail for the same reason, and that's that there's not a

1 constitutionally protected interest in receiving employer  
2 subsidized contraceptives.

3           The Court wrote about this extensively in *Harris v. McRae*,  
4 and it said there's a difference between not subsidizing and  
5 preventing access. Nothing in the final rules punishes anyone  
6 for using contraceptives. Nothing prevents people from  
7 obtaining contraceptives. It just says, "We used to require a  
8 large group of people to subsidize contraceptives. Now we've  
9 made that group slightly smaller."

10           **THE COURT:** Why were the students cut out of the  
11 settlement discussion?

12           **MS. KOPPLIN:** I'm not sure, Your Honor. Again, I  
13 don't have much knowledge about that. Plaintiffs made an  
14 argument that this sort of is an additional reason the  
15 settlement agreement is void; and as we noted in our briefing,  
16 if you read the cases they cite, those cases actually say you  
17 can't dispose of the claims of a third party and you can't have  
18 a legally binding effect on a third party through a settlement  
19 agreement. But, obviously, neither of those things happened  
20 here.

21           The settlement agreement doesn't change anything about  
22 whatever claims plaintiffs might have. They, in this lawsuit,  
23 are bringing some claims; and if they wanted to bring other  
24 claims in other lawsuits, the settlement agreement doesn't stop  
25 them. The settlement agreement just says the agencies are not

1 going to take enforcement action in these categories. So it's  
2 certainly not the case the settlement agreement has bound the  
3 plaintiffs.

4           **THE COURT:** Does the settlement agreement prevent the  
5 students from -- were the students' rights impacted by the  
6 settlement agreement?

7           **MS. KOPPLIN:** Not to my understanding, Your Honor.  
8 Any claims they may have had that they wanted to bring through  
9 private enforcement, they could still bring through private  
10 enforcement. The settlement agreement is just the government  
11 saying, "We're not going to take government enforcement action  
12 on these topics."

13           **THE COURT:** Against Notre Dame and the other --

14           **MS. KOPPLIN:** Right, and the other parties that were  
15 signatories to the agreement.

16           Finally, on equal protection, plaintiffs can't show  
17 there's any facial discrimination against women. Obviously,  
18 the text of the final rules is written in terms of whether or  
19 not the employers have religious objections, not the sex of any  
20 individuals. And if there was any distinction based on sex, it  
21 seems like it would actually go all the way back up to the ACA  
22 here, which is where the women's health mandate came from.

23           Plaintiffs instead seem to be kind of arguing a disparate  
24 impact theory, that this is something that will have an effect  
25 on women because women are the ones who use contraceptives.

1       But in order to win on that theory, they would have to show  
2 purposeful discrimination which they just can't do. So in the  
3 absence of any facial discrimination, we think rational basis  
4 review applies, and certainly the agencies here had a rational  
5 reason in order to alleviate the substantial burdens on  
6 religious exercise to take this action. And we also think that  
7 even if intermediate scrutiny did apply, which it doesn't, but  
8 that would also be satisfied because the accommodation of  
9 religious beliefs is an important government interest which the  
10 Supreme Court recognized in *Cutter*.

11           So unless you have any further questions, Your Honor, then  
12 I would just respectfully ask that you dismiss the claims as to  
13 the federal defendants.

14           **THE COURT:** All right. Thank you.

15           Ms. Tanner, am I going to hear from you first? Or  
16 Ms. Banker, I'm sorry.

17           **MS. BANKER:** Good morning, Your Honor.

18           **THE COURT:** Good morning.

19           **MS. BANKER:** My name is Michelle Banker arguing for  
20 the plaintiffs. I will be covering the jurisdictional and  
21 other threshold issues in this case. I will be covering the  
22 illegality of the settlement agreement and our procedural APA  
23 claim against the rules. My colleague Alison will be covering  
24 our substantive APA challenge to the rules and our  
25 constitutional claims.

1           Your Honor, the settlement at issue is both reviewable and  
2 it is unlawful. It is different in kind than the settlements  
3 that the Court usually sees in the ordinary course of  
4 litigation for three reasons.

5           First, although defendants have said on multiple occasions  
6 that the settlement is simply a promise not to enforce the  
7 ACA's contraceptive coverage requirement, that is a  
8 mischaracterization of what the settlement --

9           **THE COURT:** Because it is future, prospective, right?

10          **MS. BANKER:** Exactly. And I think, Your Honor, it  
11 might actually be helpful for us to read a couple passages from  
12 what the settlement agreement actually says.

13          **THE COURT:** I have it in front of me here. What page  
14 are you on?

15          **MS. BANKER:** Sure. Well, I have it by paragraph.

16          **THE COURT:** That's fine. You can just tell me the  
17 paragraph.

18          **MS. BANKER:** Okay. So if you take a look at  
19 paragraph 2.

20          It says, "The government will treat plaintiffs and their  
21 health plans, including their insurance issuers and/or  
22 third-party administrators in connection with those plans, as  
23 exempt from the regulations or any materially similar  
24 regulation or agency policy."

25          Skipping to 2E, Your Honor.

1           It says, "No person may receive the objectionable  
2 coverage" -- meaning contraceptive coverage -- "as an automatic  
3 consequence of enrollment in any health plan sponsored by  
4 plaintiffs."

5           And just looking also at 2B.

6           "If the objectionable coverage is provided, it may not be  
7 provided as part of any plan sponsored by plaintiffs."

8           Your Honor, this is not merely a promise not to enforce.  
9 It is a statement that Notre Dame is exempt from the  
10 contraceptive coverage requirement.

11           **THE COURT:** But how is that any different than the  
12 paradigm under the accommodation? I mean, my understanding  
13 when we dealt with this, I don't know, five, six years ago and  
14 had three days to write a 30-page opinion, my impression was  
15 that the provision of contraceptive services was totally  
16 separate from Notre Dame and that it was the third-party  
17 administrator that procured it on behalf of the students. And  
18 so isn't that sort of just stating the same thing?

19           **MS. BANKER:** Your Honor, this agreement is basically  
20 saying that even though that is the case, that previously it  
21 was the third-party administrator and the insurance issuer that  
22 were coming in and providing separate payments to the Notre  
23 Dame students, this is saying that Notre Dame can even block  
24 their plans from doing that.

25           **THE COURT:** How is that saying that?

1                   **MS. BANKER:** Because it's saying that "...will treat  
2 plaintiffs and their health plans, including their insurance  
3 issuers or third-party administrators, as exempt from the  
4 regulations or any materially similar regulation or agency  
5 policy."

6                   So what they have done is they have invoked this agreement  
7 as saying, "We can tell our plans that they cannot provide  
8 these separate payments that they were otherwise providing  
9 under the accommodation to our students. And as a result of  
10 that, our clients, Notre Dame students and the 17,000 people on  
11 these plans, no longer have access to contraceptive coverage  
12 without cost-sharing as required under the ACA." They have  
13 decided that this means they can no longer comply, and as a  
14 result, the TPA and the insurance issuer isn't providing those  
15 separate payments any longer.

16                  **THE COURT:** So are you saying, let's say, in 2021  
17 there's new rules --

18                  **MS. BANKER:** Uh-huh.

19                  **THE COURT:** -- that this would inoculate Notre Dame  
20 from complying with those new rules should they ever go into --

21                  **MS. BANKER:** Yes. I mean, that is what -- not even  
22 rules. This purports to exempt them from any materially  
23 similar regulation or agency policy. It even seems --  
24 purports -- points to say that future laws -- I mean, even laws  
25 of Congress, perhaps, which is clearly something the agency

1 can't do, cannot require Notre Dame to provide contraceptive  
2 coverage. It's an affirmative statement that they don't need  
3 to provide contraceptive coverage forever.

4 This is not merely a promise not to enforce the ACA. It  
5 is something entirely and wholly different, and so that is the  
6 first reason, Your Honor, that this isn't an ordinary  
7 nonenforcement decision.

8 Your Honor, there's a second major reason why this is not  
9 an ordinary nonenforcement decision subject to *Heckler*.

10 Excuse me. I'm going to grab some water.

11 **THE COURT:** Sure.

12 Ms. Banker, can I get you to slow down too.

13 **MS. BANKER:** Sorry about that.

14 **THE COURT:** It's very difficult for my court  
15 reporter -- all of you guys. It's very, very difficult for her  
16 to try to process this, and for me to try to process this too.

17 **MS. BANKER:** Sure. Sorry, Your Honor.

18 So the second reason why *Heckler* does not govern this case  
19 is because this settlement is one of a series of agency actions  
20 taken to attempt to undermine the ACA's contraceptive coverage  
21 requirement, and I think it would be helpful to give a brief  
22 timeline of events to give the context for what is actually  
23 going on here.

24 So in October of 2017, the agencies issue the interim  
25 final rules. Although the defendants say that this is only

1 going to affect .1 percent of people and that this is a tiny,  
2 tiny exemption, that is an absolute mischaracterization of what  
3 these rules do. They are the exemption that swallows the rule,  
4 and this is why I believe the California Courts said these turn  
5 the contraceptive requirement from a legal entitlement to an  
6 essentially gratuitous benefit.

7 By the department's own estimates, hundreds of thousands  
8 of people will be affected by these rules. And there's no  
9 mechanism for oversight to prevent abuse. They truly are the  
10 exemptions that swallow the rules whole. So that was their  
11 first step.

12 Then just days later, the department's executed settlement  
13 agreements with Notre Dame, and we know that at least with 97  
14 other entities, plus, unknown affiliated entities. This  
15 includes the one instrument with Notre Dame and 73 other  
16 entities. Plus we know of at least 20-odd other settlement  
17 agreements, and we strongly suspect that there are others out  
18 there.

19 **THE COURT:** Why were these secret?

20 **MS. BANKER:** There were intervenors, student  
21 intervenors in these cases, at least in the Notre Dame case,  
22 that were not included in the settlement negotiations, and the  
23 case was just dismissed on Rule 41 dismissal. They were not  
24 included in that process.

25 **THE COURT:** I remember in October of '17, I wondered,

1 "What's going on with this case," and it just kind of  
2 disappeared.

3 **MS. BANKER:** That's right. That's right, Your Honor.

4 And I will also say that there's another thing the  
5 government said that is just not correct.

6 This agreement, it absolutely does extinguish the claims  
7 of the Notre Dame students who are impacted by this. By this  
8 agreement, it says that Notre Dame is exempt. This isn't just  
9 saying the government will not enforce. This is saying Notre  
10 Dame is exempt from the contraceptive coverage requirement or  
11 any similar law or regulation.

12 And so what that means is that as long as this agreement  
13 exists, it stands between my clients and any private  
14 enforcement action, whether that be through ERISA to a state  
15 insurance commissioner, any way that they might have to try to  
16 enforce this right, this agreement now stands between them. It  
17 absolutely impermissibly trades away the rights of third  
18 parties. It is not merely an agreement not to enforce, and for  
19 this reason, it is not subject to *Heckler* discretion.

20 Your Honor, two circuit courts have already held that a  
21 settlement agreement that violates the law is reviewable under  
22 the APA. This is the Fourth in *Executive Business Media* and  
23 the Ninth Circuit in *Carpenter*. The defendants try to  
24 distinguish this case by trying to fit it into these cases, by  
25 trying to fit it into *Heckler*'s law to apply exception.

1 Notably, actually, Notre Dame brings this up but the government  
2 doesn't.

3 And the fact of the matter is, is that neither of those  
4 cases mention *Heckler*, neither of those cases tried to fit it  
5 into the law to apply exception. They said, rightly, when an  
6 agency action --

7 **THE COURT:** What do you mean by "law to apply  
8 exception"?

9 **MS. BANKER:** Sure. Sure. Sure.

10 So there is one exception to *Heckler* that exists that says  
11 if the statutes kind of very specifically tell the agencies how  
12 to enforce the law, then that could be one of the several  
13 exceptions to *Heckler*.

14 But this isn't something -- these cases were wholly  
15 outside of the *Heckler* decision and even though they were  
16 decided after *Heckler*, and for good reason. Because when  
17 agency action violates the law, even if it just takes the form  
18 of a settlement agreement, that is reviewable by a Court. Two  
19 circuit courts have already held so, so can this Court.

20 The last point I would like to make, Your Honor -- and  
21 actually, I want to take a step back and talk a little bit more  
22 about the timeline of events we were discussing before.

23 So an honest general policy point -- so they executed  
24 these settlement agreements with dozens of entities, including  
25 Notre Dame, and we don't know how many others. A few months

1 later, in addition to this, they began filing briefs refusing  
2 to substantively defend the Affordable Care Act's Birth Control  
3 Benefit in legal challenges. As of July 2018, we know of at  
4 least 13 cases where they filed briefs -- by "they," meaning  
5 the federal defendants -- filed briefs throwing up their hands  
6 and saying, "We're not going to defend this on the merits."

7 Finally, in November of 2018, the federal defendants  
8 finalized the interim final rules in -- as final rules that  
9 were, essentially, identical.

10 So, Your Honor, *Heckler* doesn't apply, A, because this  
11 isn't a promise not to enforce, but, B, because this is the  
12 extreme case that the Supreme Court contemplated when it  
13 decided *Heckler* in footnote four of that decision where they  
14 said that *Heckler* would not apply where the federal defendants  
15 or agencies have consciously and expressly adopted a general  
16 policy that is so extreme as to amount to an abdication of its  
17 statutory responsibilities.

18 That's what's happening here, Your Honor, that's what this  
19 timeline of events shows. The administration is refusing to  
20 enforce the contraceptive coverage requirement against anyone,  
21 and I will note that federal defendants have not pointed to a  
22 single case where they have enforced the contraceptive coverage  
23 requirement.

24 **THE COURT:** I understand, and I'm sympathetic. But I  
25 don't -- you keep saying the contraceptive requirement, but

1 what the ACA said was, "Come up with preventative care and then  
2 we're going to let the agency decide what that means." And  
3 they used to agree with you, but they don't agree with you  
4 anymore.

5 **MS. BANKER:** Sure. And I will say, Your Honor, my  
6 colleague, Alison, is prepared to talk at length about the  
7 substantive issues behind what the ACA requires and not.

8 But simply that, as you mentioned before, what the statute  
9 does is it provides for, you know, coverage of preventive  
10 services as required by HRSA. And HRSA has not changed the  
11 list of services that are to be included in it. All the  
12 statute gives discretion to the agencies to do is to prescribe  
13 what may be covered but not who may be covered. And, again, I  
14 will let my colleague talk in more detail about that.

15 So, Your Honor, we're in a situation where they have --  
16 the federal defendants have not enforced the contraceptive  
17 coverage requirement against anybody. They haven't pointed to  
18 a single case where they're doing this. Instead they've  
19 effectuated this general policy to undermine the ACA by issuing  
20 the rules, refusing to defend litigation, and as relevant to  
21 this case, by settling out litigation.

22 The rules and the settlement were executed just one week  
23 apart. They are a belt and suspenders of the unlawful scheme  
24 that's going on here, and a settlement agreement is simply the  
25 document that effectuates this general policy as to Notre Dame

1 and to Notre Dame students and to my clients.

2 Your Honor, the federal defendants should not be allowed  
3 to inoculate themselves from judicial review by effectuating  
4 their general policy through multiple piecemeal settlement  
5 agreements and then calling them individual nonenforcement  
6 decisions. Agencies are obligated by the constitution to take  
7 care that the laws are faithfully executed, not to undermine  
8 those laws.

9 This extreme position would allow the Executive to usurp  
10 the legislative function by decline to following the law as  
11 Congress enacted it, and that's just simply not how our  
12 government works. It is a perversion of basic principals of  
13 separation of powers. And it is certainly not what the Supreme  
14 Court decided when -- or contemplated when it decided *Heckler*  
15 *v. Chaney*.

16 And finally, Your Honor, on the question of *Heckler*, even  
17 if *Heckler* -- if the Court determines that *Heckler* applies, it  
18 would not preclude the Court from reviewing agency action that  
19 violates the constitution. *Heckler* interpreted the  
20 committed-to-agency-discretion-by-law exception to the APA but  
21 violating constitutional mandates cannot be committed to agency  
22 discretion nor can the APA, a statutory provision, constrain  
23 review of constitutional claims.

24 And the *Heckler* Court itself recognized this. Both the  
25 majority and Justice Brennan in concurrence recognized that the

1 majority's holding did not reach claims that the agency  
2 violated constitutional rights.

3 And as my colleague, Alison, will discuss, the settlement  
4 agreement violates both the Establishment Clause and the due  
5 process and equal protection guarantees of the Fifth  
6 Amendment --

7           **THE COURT:** How come nobody else challenged this  
8 settlement agreement, all these other colleagues and  
9 universities that settled with the government -- and I drew the  
10 short straw I guess -- and so what's going on with that? It  
11 does strike me that that makes this a little novel.

12           **MS. BANKER:** Yeah. And I would say, quite frankly,  
13 Your Honor, I don't know that a lot of people know what's going  
14 on. We found out about the settlement agreement through a FOIA  
15 request because one day our students' coverage changed and we  
16 didn't know why and the University president mentioned in a  
17 press release a favorable settlement with the administration.

18           **THE COURT:** That's literally how you found out?

19           **MS. BANKER:** Yes, sir. Yes, Your Honor.

20           So in the end, Your Honor, I will just say that agencies  
21 literally have no power to act, except as Congress permits, and  
22 for this reason the settlement agreement is reviewable, and it  
23 cannot survive judicial scrutiny.

24           **THE COURT:** Why should I -- I mean, this settlement  
25 agreement issue is kind of a quagmire. You have to win on both

1 issues, right? You have to both show that the rules were  
2 promulgated in violation of the APA and that the settlement  
3 agreement is illegal in some way.

4 Why should I not just shelf this until this kind of gets  
5 worked out way above my pay grade on the rules part of this?

6 **MS. BANKER:** Well -- so, Your Honor, I would say that  
7 with respect to the settlement agreement, my clients are  
8 experiencing harms right now. They are currently paying for  
9 their birth control when --

10 **THE COURT:** Yeah, but I -- unless -- if the rules  
11 remain as promulgated, that's going to continue to occur.

12 **MS. BANKER:** Well, so right now several courts have  
13 issued preliminary injunctions on these rules, and if things --  
14 and they have also said that the rules are not likely to stand,  
15 right. So if we are waiting on the Supreme Court to decide the  
16 legality of the rules, we're talking June 2020 at the earliest  
17 for the possibility that these rules will be allowed to stand,  
18 notwithstanding the fact that the Courts who have considered  
19 them already have said that they are likely to be vacated.

20 And so my clients will have to wait for, what, a year-plus  
21 for a determination of their rights, and meanwhile they are  
22 being harmed currently. And so I think this is a very ripe  
23 controversy absolutely --

24 **THE COURT:** I'm not saying it's not a ripe  
25 controversy, but I was, in some respects, surprised to see that

1 you all did not ask for a preliminary injunction.

2 **MS. BANKER:** Yes, Your Honor.

3 **THE COURT:** Is that a tactical decision to avoid,  
4 sort of, a fire drill kind of problem? Can you speak to that?

5 **MS. BANKER:** Sure.

6 Ultimately, Your Honor, our clients are students.

7 Students tend to graduate and move on, so cases can be held up  
8 thru the preliminary injunction process and not reach final --  
9 you know, final judgment, and so we wanted to just move the  
10 case forward rather than going through that process and seeking  
11 a PI.

12 **THE COURT:** I'm grateful.

13 **MS. BANKER:** Thank you, Your Honor.

14 And with respect to this argument on standing and  
15 ripeness, I do want to point out that Notre Dame points to the  
16 existence of the rules to contend that plaintiffs can't  
17 challenge the settlement while plaintiffs -- where the federal  
18 defendants point to the existence of the settlement to say the  
19 plaintiffs can't challenge the rules. The law doesn't leave  
20 plaintiffs in this catch-22.

21 As Notre Dame admits in its reply papers, its refusal to  
22 provide coverage is based on both the regulatory exemption and  
23 the settlement agreement. And these are simultaneous and  
24 independent causes of plaintiffs' harm they are experiencing  
25 right now.

1           And as we discussed before, absent the rules and the  
2 settlement, plaintiffs would have contraceptive coverage  
3 through the preexisting accommodation process, and so the only  
4 way to get complete relief is for the Court to remove both of  
5 the impediments of them accessing coverage.

6           **THE COURT:** What would be the remedy here on the  
7 settlement agreement? Like, what would I do, enjoin its  
8 enforcement?

9           **MS. BANKER:** Yes, that's right. Our contention is  
10 that the settlement agreement between Notre Dame and the  
11 federal defendants is void, and it's void for illegality. It's  
12 void *ab initio*. And, yes, absolutely, and to vacate the rules,  
13 Your Honor.

14           **THE COURT:** I mean, I understand the rules --

15           **MS. BANKER:** Right.

16           **THE COURT:** -- that seems a little more inside the  
17 box, and it's still a difficult question. But the idea that  
18 some judge sitting in Hammond is just going to tell, you know,  
19 the Attorney General that they can't settle a lawsuit, that  
20 gives me some discomfort.

21           **MS. BANKER:** I would suggest Your Honor take a look  
22 at the cases *Executive Business Media* and *Carpenter*. And these  
23 are both cases that squarely addressed the Department of  
24 Justice's authority to settle litigation, and it said that this  
25 authority stops at the walls of illegality. If I may just read

1 to you some language from these cases.

2         *Executive Business Media*, which is 3 F.3d 759, Fourth  
3 Circuit, 1993. "We think it alien to our concept of law to  
4 allow the chief legal officer of the country to violate its  
5 laws under the cover of settling litigation. The Attorney  
6 General's authority to settle litigation for its government  
7 clients stops at the walls of illegality."

8         In *United States v. Carpenter*, 526 F.3d 1237, Ninth  
9 Circuit, 2008. "While it is true that the Attorney General has  
10 plenary discretion to settle litigation to which the federal  
11 government is a party, a decision that is discretionary is not  
12 rendered unreviewable in all circumstances. Rather, where an  
13 action is committed to absolute agency discretion by law,  
14 Courts have assumed the power to review allegations that an  
15 agency exceeded its legal authority, acted unconstitutionally,  
16 or failed to follow its own regulations."

17         There's precedent to do this, Your Honor. The Court may  
18 do this as well.

19             **THE COURT:** Is there any discovery that would have to  
20 be taken in this case?

21             **MS. BANKER:** I think we would need to see the  
22 administrative record that the federal defendants put forward,  
23 but we do have constitutional claims, Your Honor, that could be  
24 helpful -- that we may need discovery on going forward.

25             **THE COURT:** Right. So in some respects isn't it -- I

1 mean, if you're looking for a quick ruling, isn't it in many  
2 ways to your benefit that I grant their motions and you get it  
3 up to the circuit so that they can decide it more quickly?  
4 Whereas, if I agree with you and I deny their motion to  
5 dismiss, this is just going to languish in litigation for  
6 another year, two years, however long it is to take discovery,  
7 do summary judgment, et cetera.

8           **MS. BANKER:** I disagree, Your Honor. I think there's  
9 a chance if you dismiss this motion this would be appealed.  
10 That appeal would be remanded back to this Court to reach final  
11 judgment. It would take even longer than if you were --

12           **THE COURT:** How would they appeal?

13           **MS. BANKER:** I'm sorry. We would appeal.

14           **THE COURT:** Right.

15           **MS. BANKER:** We would appeal. And then ultimately  
16 win and then come back and then we would have to go through the  
17 process of reaching final judgment. Your Honor, respectfully,  
18 if you deny their motion, we will move quickly to move forward  
19 to reach final judgment in this case.

20           Your Honor, a couple other things unless you have further  
21 questions on the reviewability.

22           **THE COURT:** (No audible response.)

23           **MS. BANKER:** Court's indulgence. One second.

24           The federal defendants raised an argument about privity of  
25 contract for the first time in their reply papers that I would

1 like to address with the Court right now.

2 Because it was raised for the first time on reply, it  
3 should be deemed waived; but in any event, the cases upon which  
4 the federal defendants rely concern a suit to enforce a  
5 contract where the Tucker Act typically supplies the waiver of  
6 sovereign immunity. But the question of whether a contract  
7 should be enforced is entirely separate from the question posed  
8 in this case which is whether a contract is unlawful and thus  
9 should be deemed void for illegality.

10 Such a question is not founded upon a contract, which is  
11 the phrase for which the Tucker Act typically supplies waiver  
12 of sovereign immunity. Instead it is a legal claim and the  
13 waiver of sovereign immunity is supplied by the APA. And  
14 because it a legal claim, the privity requirement is not  
15 applicable.

16 For this reason, it is not surprising that in the  
17 *Executive Business Media* case and *Carpenter* case that I just  
18 read for you, third parties challenged a settlement agreement  
19 with the government and privity was not an obstacle.

20 Your Honor, turning to the substantive illegality of the  
21 settlement agreement. We have already touched on several  
22 reasons why the agreement is unlawful, but I just want to make  
23 clear that the agreement is unlawful, in part, because it  
24 creates this blanket exemption from the Affordable Care Act  
25 that -- as my colleague will discuss -- is not authorized by

1 the Affordable Care Act but also because the Supreme Court has  
2 made clear in this case, *Local 93*, that parties who chose to  
3 resolve litigation through settlement may not dispose of the  
4 claims of a third party and may not impose duties or  
5 obligations on a third party without that party's agreements.

6 Again, the federal government has said that hasn't  
7 happened here, and we completely disagree. Our view is that  
8 this agreement will extinguish the ability of our clients to  
9 privately enforce their right to contraceptive coverage through  
10 either ERISA or some other mechanism. As long as this  
11 agreement exists, it stands as an impediment to them being able  
12 to enjoy the benefits of the right they are entitled to by law.

13 Second, the settlement defies the Supreme Court's  
14 unambiguous instruction in *Zubik* and in Notre Dame's own case  
15 to resolve legal challenges to the contraceptive coverage  
16 requirement in a manner that accommodates the religious  
17 exercise while at the same time ensuring -- ensuring that women  
18 covered by the entity's health plans receive full and equal  
19 health coverage, including contraceptive coverage.

20 This is not merely a suggestion. It is a direction. That  
21 whatever resolutions defendants reached, it was required to  
22 ensure that plaintiffs received the coverage they are entitled  
23 to by the ACA.

24 However, federal defendants have done just the opposite.  
25 They are allowing Notre Dame to block its students from

1 receiving coverage through the accommodation process.

2 Moreover, the settlement agreement is also illegal because  
3 it is trading away the constitutional rights of my clients in  
4 defiance of DOJ internal guidance. I will say to the point  
5 about raising new claims that we didn't plead, we knew DOJ  
6 internal guidance is simply like case law. It interprets the  
7 law as it exists. We're not bringing a new claim. We pled in  
8 the complaint that the settlement agreement violates the law,  
9 and the DOJ internal guidance that we are citing to is  
10 interpreting that law and why what is going on here is  
11 unlawful.

12 And so the ways that it's unlawful, as explained by this  
13 DOJ guidance, is that it trades away the constitutional rights  
14 of parties, which the Moss memo very specifically says agencies  
15 cannot do. And further, it purports to bind future  
16 administration. It cabins that future discretion which, again,  
17 as the Meese memo says, it's improper and is not what DOJ  
18 should be doing when it enters into settlement agreements.

19 And as my colleague Alison will discuss, because it also  
20 defies the ACA and is not authorized by RFRA and violates the  
21 Fifth and First Amendments of the constitution, it is illegal  
22 for those reasons as well.

23 Unless Your Honor has any further questions on the  
24 settlement illegality, I would be happy to turn to the  
25 procedural APA claim now.

1                   **THE COURT:** Let's take about a 10-minute break before  
2 you do.

3                   **MS. BANKER:** Okay. Thank you.

4                   (A recess was had at 11:20 a.m.)

5                   (The following proceedings were held in open court  
6 beginning at 11:29 a.m., reported as follows:)

7                   **DEPUTY CLERK:** All rise.

8                   **THE COURT:** Ms. Banker, do you want to continue  
9 there?

10                  **MS. BANKER:** Your Honor, before we get into the  
11 procedural APA claim, I did want to make a point about the  
12 *Deotte* case that opposing counsel raised.

13                  So, yes, that was decided, I think, just last week. To be  
14 clear, this wasn't a nationwide injunction. It was a  
15 nationwide class. And the class members are as yet  
16 unspecified, but more importantly --

17                  **THE COURT:** He certified a class?

18                  **MS. BANKER:** He certified a class and issued an  
19 injunction on a class-wide basis.

20                  So I think the most important thing to know is that class  
21 is for employers, and the student that we present in that case  
22 would not be covered by that injunction, number one.

23                  Number two, the State of Nevada had tried to intervene in  
24 that lawsuit, and the intervention motion was just never  
25 granted. So at this point, I don't know what the next steps

1 are. I imagine there will be an appeal of some sort, so that  
2 case is yet to be sorted out. It is by no means a final  
3 determinant about what's going on in these cases.

4           **THE COURT:** This is an absolute mess, right? It's a  
5 mess.

6           **MS. BANKER:** There is a lot going on, Your Honor.  
7 There is a lot going on, but currently speaking, our clients  
8 are suffering concrete harms from what's going on.

9           **THE COURT:** It's very frustrating as a lower court  
10 judge to -- it just seems to me that it was the parties'  
11 obligation to force an answer from the Supreme Court.

12           **MS. BANKER:** That's right.

13           **THE COURT:** What's done is done, and instead we have  
14 this -- I don't understand it. Go ahead.

15           **MS. BANKER:** But instead what the government did is  
16 they settled all the cases and just stopped defending  
17 litigation entirely writ large, which is why we think this is  
18 just an abdication of their responsibility to enforce rather  
19 than undermine the Affordable Care Act.

20           **THE COURT:** Thinking they're buying peace in  
21 litigation and here they are in Indiana on another lawsuit.

22           **MS. BANKER:** Right.

23           **THE COURT:** And probably more to come.

24           **MS. BANKER:** And that goes to show that this wasn't a  
25 discretionary decision of allocating resources in this or that

1 litigation. They just didn't defend at all.

2           **THE COURT REPORTER:** I'm sorry. You need to please  
3 slow down.

4           **THE COURT:** Yeah. I mean, all of you guys, you speak  
5 so fast it's very hard -- you guys understand this stuff so  
6 much better than we do. And, you know, trying to process this,  
7 it's hard. It really is.

8           **MS. BANKER:** My apologies. I'm a fast talker anyway,  
9 so I will slow down.

10          So turning to the procedural APA claim. Federal  
11 defendants issued the rules initially as procedurally defective  
12 interim final rules and then this error infected the final  
13 rules as well. And this is under the standard set forth by the  
14 D.C. Circuit. Notwithstanding what federal defendants claim,  
15 the solicitation of post-promulgation comments does not cure  
16 this defect.

17          First, the interim final rules could only have been issued  
18 where Congress had expressly stated that the APA was  
19 inapplicable or where there was good cause, which is a very  
20 narrow exception. It applies to limited emergency situations  
21 or routine and inconsequential rules and every Court to  
22 consider the issue, including the Ninth Circuit, the Northern  
23 District of California, and the Eastern District of  
24 Pennsylvania twice, have held that federal defendant's issuance  
25 of rules of IFRs failed this test. There was no emergency, and

1 the significant public outcry over these rules really  
2 illustrates that they are anything but routine.

3 In addition, the Eastern District of Pennsylvania recently  
4 held that the final rules are also procedurally infirm,  
5 notwithstanding the solicitation of post-promulgation comments.  
6 The Eastern District of Pennsylvania held that "The failure to  
7 comply with the APA's notice and comment requirements when  
8 issuing the IFRs fatally tainted the final rules such that the  
9 issuance of the final rules violated the APA."

10 And this is under a standard that the D.C. Circuit has  
11 consistently reiterated, which is that when an agency foregoes  
12 notice and comment the resulting rules are presumed invalid.  
13 The presumption can only be rebutted if the government -- not  
14 the plaintiffs -- if the government makes a compelling showing  
15 that it has kept an open mind. The burden is on the government  
16 and not on the plaintiffs.

17 The Third Circuit has also held, as the Eastern District  
18 of Pennsylvania phrased it, that "There is a deep skepticism  
19 towards the curative powers of post-promulgation notice and  
20 comment procedures." And in that circuit, the presumption of  
21 invalidity simply cannot be rebutted. In other words,  
22 post-promulgation comments cannot cure the initial procedural  
23 defect.

24 Your Honor, the federal defendants have discussed a case  
25 in the Seventh Circuit that is entirely inapposite. The

1      Seventh Circuit has not addressed whether an agency's  
2      solicitation of post-promulgation comments after issuing an  
3      interim final rule that failed to comport with the APA's notice  
4      and comment requirements can cure the APA violation. The  
5      single case they rely on is inapposite because it involved a  
6      very particular provision of the Clean Air Act in which  
7      Congress explicitly shifted the burden onto the plaintiffs to  
8      prove that the regulation at issue would have been  
9      substantively different had the EPA engaged in notice and  
10     comment.

11           So they changed it from requiring the government to show  
12     an open mind to requiring the plaintiffs to show actual  
13     prejudice, which is an entirely different standard. No similar  
14     provision is at play here.

15           So under the APA, at best, the government has the burden  
16     of proving that its mind remained open. At worse,  
17     solicitation of post-promulgation comments simply cannot cure  
18     the procedural defect at all. Here the plaintiffs have  
19     actually --

20           **THE COURT:** What would they do in the case where they  
21     screw up and so there's a defect in the procedure? What are  
22     they supposed to do? How do they address that?

23           **MS. BANKER:** Sure.

24           The way they could have done it here, but they didn't, is  
25     to invalidate the IFRs, issue a new notice of proposed rule

1 making, and go to the comment process.

2                   **THE COURT:** But isn't that what they did to get to  
3 the final rules?

4                   **MS. BANKER:** No, they kept the interim final rules in  
5 effect, but so egregiously, after doing that, they took actions  
6 immediately thereafter to entrench their policy decision. In  
7 fact, rather than keeping an open mind, they started executing  
8 settlement agreements relying on and further entrenching the  
9 rules just starting a week afterwards, a week after  
10 promulgating the interim final rules.

11                  They refused to defend litigation challenging the ACA  
12 contraceptive coverage requirement in court while they  
13 vigorously defended the IFRs at the same exact time they were  
14 purporting to consider comments on those rules. In addition,  
15 they started the process of implementing the forms for the new  
16 optional accommodation.

17                  And so, Your Honor, even though the plaintiffs don't have  
18 the burden, even though the burden is on the government to keep  
19 an open mind, we actually have a lot of evidence here that they  
20 did not have an open mind. All of these things which we have  
21 pled in the complaint show that.

22                  The policy reasons behind this are strong because if  
23 agencies can cure their procedural APA violations by issuing  
24 rules first and then seeking comments later, the exception will  
25 swallow the rule and the APA's notice and comment requirement

1 becomes meaningless. It's precisely to prevent agencies from  
2 acting first and thinking later that these requirements exist.

3 And, you know, this is exactly some of the policy reasons  
4 animating the Court's decision in Pennsylvania to say, "No,  
5 these final rules were procedurally ineffective. They are also  
6 infirm because the interim final rules were also infirm."

7 In fact, I think a quote from the Pennsylvania Court is a  
8 little bit helpful. What they said is that "Participants are  
9 less likely to influence agency action in later stages of the  
10 agency decision-making process and this is especially the case  
11 where an agency has already issued interim final rules which  
12 suggests it has decided what federal policy should be.

13 Post-issuance commentary does not ameliorate the need for  
14 notice and comment because by the time agencies issue interim  
15 rules they are less likely to heed public input. Last,  
16 permitting post-issuance commentary carte blanche would write  
17 the notice and comments out of the APA."

18 Your Honor, unquestionably federal defendant's mind was  
19 made up, and it's unsurprising then that the rules are  
20 materially and functionally the same. Accordingly, as the  
21 Eastern District of Pennsylvania already held, the final rules  
22 are fatally tainted by the IFR's procedural infirmities and  
23 must be set aside.

24 Your Honor, I will just finish by saying that the  
25 settlement agreement is both reviewable and it is unlawful and

1 the final rules are procedurally infirm. And my colleague,  
2 Alison, will explain more why the rules are also substantively  
3 unlawful and violate the constitution.

4           **THE COURT:** Thank you. Thanks, Ms. Banker.

5           **MS. BANKER:** Thank you, Your Honor.

6           **THE COURT:** Ms. Tanner.

7           **MS. TANNER:** Good morning, Your Honor. Alison Tanner  
8 for plaintiffs.

9           As previously explained, I will be addressing the  
10 subjective APA violations and the constitutional claims here.

11           Now, federal defendants have traded away the plaintiffs'  
12 rights and have done so in excess of their statutory authority,  
13 arbitrarily and capriciously, and in violation of federal law  
14 and the constitution.

15           Turning first to plaintiffs' subjective APA claims. We're  
16 treading little new ground here, Your Honor. Two federal  
17 district courts have already held that the plaintiffs' states  
18 [verbatim] are likely to succeed on the merits of their claim  
19 that federal defendants did not have the authority, either  
20 under the ACA or RFRA, to create these rules.

21           First, the defendants' proposed interpretation of the ACA  
22 is simply outside of the universe of *Chevron* because what they  
23 are interpreting here, or proposing to interpret, was not  
24 delegated to them. Both of the federal district court  
25 decisions already decided here have rested on a fundamental

1 principle of administrative law which is that federal agencies  
2 do not have the authority to act unless and until they are  
3 conferred the power to do so by Congress. And both of those  
4 courts held that the ACA specifically designates who must  
5 provide the comprehensive women's preventative healthcare  
6 services, and nowhere in the ACA does it delegate to the  
7 agencies any authority to create exemptions from the clearly  
8 defined category.

9 So if we look at the ACA itself, it says that all  
10 nongrandfathered group health plans and health insurance  
11 issuers shall provide coverage for comprehensive women's health  
12 services as provided for in comprehensive guidelines created by  
13 HRSA. And so that speaks plainly that the category of who must  
14 provide is all nongrandfathered group health plans and health  
15 insurance issuers. And when a federal law creates the  
16 authority to give meaning to what is occurring here, what  
17 constitutes women's preventative healthcare, it does not  
18 typically grant authority to create exemptions from those laws.

19 And so what HRSA did is they filled in the blank of what  
20 women's preventative healthcare, was and then now with these  
21 rules, HHS is trying to carve out who. But there is simply  
22 nothing in the statute that grants them the authorization to do  
23 so.

24 The federal agencies are --

25 **THE COURT:** But this can't be any broader than what

1 they are asking HHS to do. I mean, the language of the  
2 statute, not surprisingly, is extremely broad; and they are  
3 delegating to HHS to put the details in there. Why is that not  
4 implicit in that that exemption could exist?

5 **MS. TANNER:** The language of the statute delegates to  
6 HRSA the authority to determine broadly what constitutes  
7 women's preventative healthcare, what is necessary, and HRSA  
8 identified 10 different services that were essential. But the  
9 statute is not broad in terms of who must provide that  
10 insurance coverage. That is clear within the statute; it is  
11 all nongrandfathered group health plans and health insurance  
12 issuers. There's nothing within there that suggests that the  
13 agencies have the authority to create new exemptions there.

14 And, Your Honor, defendants try to stretch this phrase  
15 within the statute "as provided for" to give them the authority  
16 to grant these exemptions. But this interpretation deserves no  
17 deference because it is contrary to the plain meaning of that  
18 phrase within the context of this statute because here in this  
19 particular subsection of the preventive health services  
20 statute, uniquely, here, the comprehensive guidelines simply  
21 have not been created yet. And so "as provided for" means  
22 nothing more than the comprehensive guidelines would be  
23 provided at a later date by HRSA.

24 To sharpen this point, I can provide you with a  
25 hypothetical. Imagine that Congress created a statute that

1 says, "All cars must have seat belts that meet certain  
2 specifications, including any additional specifications as  
3 provided for in guidelines drafted by the seat belt safety  
4 administration."

5 So if the seat belt safety administration issued  
6 guidelines that exempted red cars, that would not plausibly be  
7 an exercise of the authority delegated to them by Congress.  
8 Rather, that would be the seat belt safety administration  
9 replacing their judgment for Congress's judgment that all cars,  
10 red cars, green cars, and blue cars must include safe seat  
11 belts. That's exactly what's occurring here, Your Honor.

12 Now, defendants attempt to point to a myriad of other  
13 textual inferences in order to construct statutory authority  
14 under the ACA, but this runs counter to yet another important  
15 principle of administrative law, which is that Congress knows  
16 how to speak plainly. If Congress had intended to grant the  
17 agencies here the authority to create exemptions under the ACA,  
18 it simply would have said so, but it did not.

19 Further, Your Honor, even if the agencies were granted  
20 somehow under the ACA the authority to create exemptions --

21 **THE COURT:** So was it permissible for them to create  
22 exemptions for churches?

23 **MS. TANNER:** Your Honor, the exemptions for churches  
24 are wholly different.

25 **THE COURT:** I understand that, but if I accept you at

1 face value, even that would have been improper.

2           **MS. TANNER:** Rather, Your Honor, as the agencies  
3 addressed in the Federal Register announcing the church  
4 exemption, their justification there was based on the special  
5 constitutional protections that are provided to churches to  
6 prevent governmental interference with their internal  
7 governance. And that's why --

8           **THE COURT:** This is just a cousin of that?

9           **MS. TANNER:** Rather, Your Honor --

10          **THE COURT:** Go ahead.

11          **MS. TANNER:** I'm so sorry.

12          The agencies here do not suggest that they have  
13 constitutional authority to create these. They cite to two  
14 specific statutes, the ACA and RFRA, and that's why the church  
15 exemption is wholly of a different kind. The authority there  
16 is through that special protection provided under both of the  
17 religion clauses. And plaintiffs' claims here will simply have  
18 no effect on the constitutional rights of churches.

19          **THE COURT:** No, I understand that. My point is that  
20 if I accept you at face value, then it would have been improper  
21 for them to even come up with a church exemption.

22          **MS. TANNER:** That, again, is not what plaintiffs are  
23 arguing because there is this separate -- wholly separate  
24 authority which is the doctrine of constitutional law as shown  
25 in *Amos*.

1                   **THE COURT:** I thought it's RFRA that led to the  
2 church exemption.

3                   **MS. TANNER:** No, Your Honor, that is simply not what  
4 the government's position was up until this series of  
5 litigation. You can look to -- and I believe it is cited in  
6 our brief -- but the actual Federal Register announcement in  
7 2011 for the church exemption does not claim any authority  
8 under RFRA. Rather, it looks specifically to these  
9 constitutional concerns.

10                  Further, Your Honor, I would just note that the church  
11 exemption applies to all houses of worship and not just to  
12 those that have religious objections to contraception, and  
13 that's how we know, also, that RFRA is not the authority for it  
14 because RFRA only applies to, you know, religious objectors  
15 with a substantial burden on their religious exercise, as I  
16 will turn to shortly.

17                  Moving back, I just want to address that the exemptions  
18 here are contrary to the purpose of the Women's Health  
19 Amendment, which is the amendment that is at issue today. So  
20 when the Women's Health Amendment was passed by Congress, their  
21 specific purpose was to ensure that women were not paying more  
22 out of pocket than men for healthcare as they had prior to the  
23 ACA.

24                  But as the Northern District of California has already  
25 held, the exemptions here transform the contraceptive coverage

1 requirement from a legal entitlement to a wholly gratuitous  
2 benefit that is subject to an employer's discretion and thus  
3 puts women back in that unequal position. And we should look  
4 specifically to what Notre Dame has done here, which I don't  
5 believe has been mentioned yet, Your Honor.

6 Notre Dame says it objects to certain types of IUDs and  
7 the emergency contraception, and, therefore, those are wholly  
8 not covered by their plan. But, additionally, Your Honor,  
9 Notre Dame has imposed a copayment for all other forms of  
10 contraception. This runs counter to the express commands of  
11 the ACA that there not be any cost-sharing requirements for  
12 preventive women's health services, but Notre Dame, under the  
13 settlement agreement -- and, I mean, they haven't really  
14 explained the source of authority for this -- they are imposing  
15 copayments on women in contravention of the Women's Health  
16 Amendment.

17 Also it's important to note because the two other district  
18 courts have addressed this issue, found it compelling, that  
19 Congress considered sweeping exemptions from the ACA and  
20 rejected those exemptions. That was discussed in *Hobby Lobby*  
21 at footnote 30, so Congress already considered the issue of  
22 whether to grant religious exemptions here and refused to do  
23 so. So here the federal agencies have replaced their judgment  
24 for Congress's.

25 Now, turning to RFRA, Your Honor. RFRA does not authorize

1 much less require these rules. RFRA's statutory protections  
2 are only triggered when its prerequisite has been met. So,  
3 first, the government must have imposed a substantial burden on  
4 religious exercise.

5 And looking to the text of the interim final rules, the  
6 final rules, and the settlement agreement, the decision here to  
7 grant the religious exemptions was explicitly based on the  
8 federal agency's determination that the accommodation created a  
9 substantial burden. So that's in paragraph 4 of the settlement  
10 agreement, in the IFRs that's at 47,800, and in the final rule  
11 that's at 57,546. That is their interpretation.

12 But as you well know, most federal courts to have  
13 considered whether the accommodation created a substantial  
14 burden held that it does not. And yet after these court  
15 victories, the agencies completely reversed their position and  
16 specifically premised the rules on their newfound conclusion  
17 that the accommodation violated RFRA. That conclusion is  
18 wrong, and it is not entitled to deference from this Court.

19 RFRA does not dedicate to any specific agency the  
20 interpretation of whether or not a burden is substantial.  
21 Rather, as the Seventh Circuit held in *Korte v. Sebelious*,  
22 which is one of those cases leading up to *Hobby Lobby*, and in  
23 that case the Seventh Circuit held that whether a burden is  
24 substantial is a legal question and RFRA specifically provides  
25 for judicial review.

1           And the government's legal conclusion here is wrong as a  
2 matter of law because the facts, Your Honor, simply have not  
3 changed since this Court first ruled on that issue in 2013.  
4 Since the Seventh Circuit's two decisions in *Notre Dame I* and  
5 *II* and since those eight -- or sorry -- seven other federal  
6 circuit courts of appeals decisions.

7           While the Supreme Court in *Zubik* vacated and remanded  
8 those decisions, it did not reverse the reasoning of those  
9 decisions or even attack the underlying reasoning. And,  
10 therefore, we think this Court should look to the Third  
11 Circuit's decision in a case called *Real Alternatives* that was  
12 post-*Zubik*. There, the Third Circuit reaffirmed its pre-*Zubik*  
13 decision in *Geneva College*, in which that Court agreed with  
14 this Court and the Seventh Circuit that the accommodation did  
15 not create a substantial burden.

16           And the Third Circuit specifically reasoned that because  
17 the vacating and remanding did not attack its earlier  
18 reasoning, that earlier reasoning was at the very least highly  
19 persuasive. And that is also what the Northern District of  
20 California concluded in its recent decision that RFRA did not  
21 authorize these rules. And so the facts have not changed and  
22 therefore Your Honor's reasoning should still hold.

23           The accommodation does not compel Notre Dame to modify its  
24 behavior in a way that is contrary to its religious beliefs  
25 but, rather, merely requires it to provide notice to its

1       third-party administrator and health insurance issuer of its  
2       desire not to cover contraceptives just as Notre Dame had done  
3       prior to the passage of the ACA.

4           Whether Notre Dame now characterizes the resulting  
5       contraceptive coverage that is required by law after that  
6       notification, the results of their "authorization," as they  
7       have said previously, are now as a result of the "hijacking" of  
8       their plan matters, not because the specific text of the  
9       regulation here, 45 CFR 147.131, states that the accommodation  
10      excludes contraception coverage from Notre Dame's group health  
11      plan. It requires the third-party administrator to segregate  
12      all of the premium revenue, and it requires that third-party  
13      administrator to provide separate notice of anything having to  
14      do with that contraceptive coverage.

15           Further, when --

16           **THE COURT:** Who pays for it?

17           **MS. TANNER:** So there's two processes at issue here  
18      because the employee -- or employer plan is self-insured so  
19      there the third-party administrator is the one who is paying.  
20      Whereas, with the student plan, that's through an Aetna plan  
21      and there Aetna gets reimbursement from the government.

22           **THE COURT:** Does the third-party administrator get  
23      reimbursement from the government?

24           **MS. TANNER:** The third-party administrator is --

25           **THE COURT:** In the self-funded plan situation.

1                   **MS. TANNER:** Yeah. The third-party administrator  
2 receives money from the individual marketplace, and  
3 Your Honor's opinion in 2013 explains this very well.

4                   **THE COURT:** Well, yeah, it was confusing though.

5                   **MS. TANNER:** Yes.

6                   **THE COURT:** I wasn't quite sure I had that right,  
7 frankly, to be candid about it. But I don't really understand  
8 the mechanics of how the third-party administrator is made  
9 whole without it having some impact on the underlying provider,  
10 in this case, Notre Dame.

11                  **MS. TANNER:** The only thing relevant to the Court's  
12 analysis here is that it is in no way coming out of Notre  
13 Dame's pocket as provided.

14                  **THE COURT:** Costless to them?

15                  **MS. TANNER:** Yes, Your Honor.

16                  And also when Notre Dame was complying with the  
17 accommodation, so prior to the 2018/2019 school year, those on  
18 the student plan would receive a wholly separate card for their  
19 contraceptive coverage, so they even, you know, had a different  
20 than from their regular Notre Dame health insurance plan, a way  
21 to receive that contraception coverage.

22                  And as this Court previously held, it is simply not Notre  
23 Dame's prerogative to dictate based on its religious beliefs  
24 what healthcare services the government may require from third  
25 parties.

1           So Judge Posner's decision in *Notre Dame I* is particularly  
2 instructive here. He analogized it to a religious objector to  
3 war who is able to be -- is able to refuse to engage in  
4 fighting, but that religious objector is not able to block the  
5 government from then going ahead and selecting another  
6 individual to fight in his stead. This is because RFRA  
7 requires that an accommodation of certain religious beliefs  
8 does not mean that the accommodated can dictate how the  
9 government then achieves by substitute measures its overall  
10 aim.

11           Likewise, this is in line with the Supreme Court's  
12 decision in *Bowen v. Roe* in which the Supreme Court held that a  
13 Native American father was not entitled to dictate based on his  
14 religious objection how the government would use Social  
15 Security numbers in its internal administration.

16           So because there is no substantial burden here created by  
17 the accommodation process and -- meaning, that RFRA's statutory  
18 prerequisite simply has not been met -- there is no RFRA  
19 authorization, let alone requirement, for the religious  
20 exemptions here.

21           Therefore, the Court need not reach the compelling  
22 interest by least restrictive means analysis, but if it were  
23 to, the accommodation would pass that test. That is what the  
24 D.C. Circuit and Eleventh Circuit previously held. In the D.C.  
25 Circuit, that was *Priests for Life* and the Eleventh Circuit it

1 was *Eternal World Television Network*.

2 The defendant's assertion here that the federal agencies  
3 have the last say on what constitutes a compelling governmental  
4 interest simply cannot be abided because this would allow the  
5 federal agencies to say if they did not like or if they did not  
6 think a statutory regime was important they could refuse to  
7 enforce it no matter what Congress said, and this would simply  
8 grant outside authority to the federal agencies.

9 **THE COURT:** I understand these arguments.

10 Can you just briefly address the constitutional claims.

11 **MS. TANNER:** Absolutely, Your Honor.

12 **THE COURT:** I'm running out of time here.

13 **MS. TANNER:** Of course.

14 And I would just note that the compelling interest in  
15 addition to the, you know, women's equality is also in  
16 preventing the Establishment Clause violation that occurs under  
17 these rules which is forcing third parties to bear the harms  
18 of -- you should be very glad that you're telling me to skip  
19 over all of this -- that is forcing third parties to bear the  
20 harms of Notre Dame's religious beliefs.

21 So under the Establishment Clause, that is simply a  
22 well-settled rule. The Court should turn to *Estate of Thornton*  
23 v. *Caldor* as a prior statement of it. There the Supreme Court  
24 invalidated a law that required employers to accommodate  
25 workers' religious days of rest in all instances without

1 exception because that law imposed on employers the costs of  
2 having to find someone or hire enough staff to fill whatever  
3 day of rest another employee required, and it also required the  
4 other employees the inconvenience of having to fill in those  
5 positions.

6 The Supreme Court held in *Cutter V Wilkinson* that RLUIPA,  
7 which is RFRA's sister statute, must be interpreted so as to  
8 take into account these third-party harms in order to comply  
9 with the Establishment Clause.

10 So here, Your Honor, the exemptions here force plaintiffs  
11 and other women to bear the costs of Notre Dame's religious  
12 objections either by paying out of pocket for their  
13 contraception or to also pay now copays under the regime that  
14 Notre Dame has established.

15 And in addition to those financial burdens, it also, for  
16 many women, will limit their choice of contraception because  
17 they must also pay for the medical advice that they receive  
18 about which contraception is right for them.

19 And so if they are experiencing side effects from a type  
20 of contraception, they may be deterred from returning to the  
21 doctor to see if there's a different form that's better for  
22 them because, again, they would have to pay out of pocket for  
23 that additional doctor's visit.

24 The Establishment Clause issue here is also that there is  
25 no substantial burden on Notre Dame's religious exercise under

1 the accommodation and thus this grants Notre Dame a wholly  
2 gratuitous new right on the basis of its religious beliefs, and  
3 that is an impermissible promotion of religion. Indeed, the  
4 rules single out this particular religious belief for extremely  
5 favorable treatment that is provided to no other request for an  
6 accommodation because under the rules there is no test for the  
7 sincerity of a religious belief. There is no test for the  
8 nexus between what is objected to and what is excluded from the  
9 plan, and there is no test for the burden. And so this is a  
10 unique, special, and extremely favorable treatment of the  
11 religious beliefs at issue here.

12         Turning to the substantive due process claim. We can rest  
13 on the papers except to say that *Harris v. McRae* is just not  
14 controlling here because the government already wishes to  
15 provide the subsidy, and the government action here is  
16 authorizing Notre Dame to then intervene and block that  
17 provision. And so that's interference that implicates the  
18 substantive due process pleas of plaintiffs and other women.

19         And further, I just would like to, again, rest on the  
20 papers on the equal protection except to address one statement  
21 made by government counsel, which is that the Equal Protection  
22 Clause actually can apply even when it is a small class or  
23 single individual who is being discriminated against when that  
24 discrimination is based on a suspect classification.

25         Thank you, Your Honor.

1                   **THE COURT:** Thank you.

2                   Mr. Dick, I will give you just a couple of minutes to  
3 reply.

4                   **MR. DICK:** Thank you, Your Honor.

5                   Thanks very much, Your Honor. I know we've kept you here  
6 long enough already, so I will keep it brief on just a few  
7 points.

8                   Starting on the settlement. We do think it's well within  
9 Your Honor's discretion to hold off on deciding that.  
10 Plaintiffs don't dispute this Court has the discretion to wait  
11 until the final rules are resolved.

12                  As you noted, they haven't moved for preliminary  
13 injunction. They haven't asserted that they're suffering any  
14 irreparable harm. We think the reason for that, frankly, it's  
15 not in the record, but the harms they're facing right now we  
16 think would not be sufficient because they effectively are  
17 already getting all the coverage they need.

18                  If you look at the allegations in their complaint, my  
19 understanding from the University's health plans is that they  
20 can get oral contraceptives for a \$5 copay per month. Weigh it  
21 against harms to Notre Dame forcing it to violate its religious  
22 beliefs, we don't think that that balance is particularly  
23 close.

24                  And with respect to the two plaintiffs they discuss who  
25 have IUDs, it's not clear whether they still need to get them

1 or they already have them. Even if they did need to replace  
2 them, they last for three to six years, and we think at the  
3 worst-case scenario, the cost of that would average out to less  
4 than \$20 a month over the life of that device.

5 So we just don't think there's any real emergency here.  
6 They haven't alleged an impediment to actually being able to  
7 get any of the services they want. So we do think it would be  
8 reasonable. There's no crisis. As you noted, this is a  
9 gigantic mess across the country. The Supreme Court is going  
10 to have to resolve this. So to do this in an orderly fashion,  
11 to most efficiently use this Court's resources, and stay out of  
12 the quagmire of weighing in on the settlement agreement.

13 To address that settlement briefly, I do want to emphasize  
14 just how far out on a limb the plaintiffs would put Your Honor  
15 to hold that this would be a reviewable settlement agreement.  
16 We think it's quite clear that this is a nonenforcement  
17 agreement and that this type of nonenforcement agreement is not  
18 reviewable.

19 If you look at the settlement itself -- I was part of the  
20 settlement negotiations. I can tell you it has always been  
21 understood as a nonenforcement agreement. That's made clear  
22 both in paragraph 2 and paragraph 4.

23 In paragraph 2, it does refer to --

24 **THE COURT:** What's the distinction you are drawing?

25 **MR. DICK:** So it does not affect the substantial

1 rights of the plaintiffs if they want to bring claims. It only  
2 says the government will not enforce the mandate or the  
3 regulations against Notre Dame. It does not affect the  
4 substantial rights of the parties. If the plaintiffs want to  
5 bring their own claims, they can bring those claims  
6 independently.

7 Because what the settlement agreement clearly says is the  
8 government will treat the plaintiffs as exempt from the  
9 regulations, so that contemplates two different things. There  
10 may be regulations that require Notre Dame to provide the  
11 coverage. It just says the government will not enforce. It  
12 expressly says "enforce" in paragraph 4.

13 And in paragraph 2 it says, "The government agrees to  
14 abide by the terms of the permanent injunction in *Zubik v.*  
15 *Sebelious*." If you look at that order that's cited, that order  
16 specifically refers to "The government will not apply or  
17 enforce the requirements in the regulations." So we think it  
18 was clear to everybody at the time that this agreement was just  
19 that the government was not going to enforce the mandate  
20 against the regulations. The plaintiffs have a private right  
21 of action they could assert, and they just can't get the  
22 government to enforce it on their behalf.

23 So we think in that type of situation *Heckler* makes quite  
24 clear that you can't have judicial review of that type of  
25 nonenforcement agreement. The contrary argument made by the

1 plaintiffs --

2           **THE COURT:** So I guess -- explain how that would  
3 work. Let's say in the future an individual plaintiff would  
4 want to enforce their rights under some contraceptive mandate.  
5 How would they go about doing that?

6           **MR. DICK:** They would file a private cause of action,  
7 a private claim --

8           **THE COURT:** Against who?

9           **MR. DICK:** Against Notre Dame under ERISA saying  
10 there's a regulation that says you have to --

11           **THE COURT:** How does a student do it under ERISA?

12           **MR. DICK:** So it's not clear to us whether students  
13 have a private claim under ERISA. If not, that's Congress's  
14 choice not to grant them that right, and it is sometimes the  
15 case that there is no private right of action to assert a claim  
16 like that. Sometimes if you're a private party, you just have  
17 to rely on the government's enforcement discretion. And  
18 sometimes --

19           **THE COURT:** They can't here.

20           **MR. DICK:** Sometimes the government will decide not  
21 to enforce a law to benefit a third party just like in *Heckler*  
22 where the parties were going to be executed by drugs that they  
23 claimed from unlawful, and the government said, "We're not  
24 going to enforce the law that you think makes those execution  
25 drugs unlawful." The Supreme Court said, "I'm sorry. Even

1 though it would benefit you, you don't have the right to sue to  
2 make the government enforce a law that will benefit you."

3 That happens every day with all kinds of laws. It happens  
4 with murder laws. It happens with obstruction of justice laws.  
5 Lots of people would like to see those laws enforced, and  
6 sometimes the government decides not to bring the prosecution,  
7 and parties who would benefit from enforcement nonetheless  
8 can't enforce the government to enforce the law.

9           **THE COURT:** But the point remains then -- you started  
10 by saying that they retain a private right of action, but they  
11 really don't retain a private right of action.

12           **MR. DICK:** Well, they retain a private right of  
13 action to the extent Congress gave them one. We think it's  
14 clear that they had that private right of action --

15           **THE COURT:** Which is to say that they have no private  
16 right of action?

17           **MR. DICK:** With respect to the faculty and staff  
18 plan, they clearly do.

19           **THE COURT:** That I understand.

20           **MR. DICK:** With respect to the student plans, it's  
21 not clear whether they could sue the insurance company, whether  
22 they could sue the University. We haven't taken a definitive  
23 position on that because we don't know. But even if they don't  
24 have a private right of action, my point was it's still not the  
25 case that just because you don't have a private right of action

1 you can compel the government to enforce the law to benefit  
2 you.

3           **THE COURT:** I understand that.

4           **MR. DICK:** Because in *Heckler* there was no private  
5 right of activity, and they still couldn't compel that type of  
6 thing.

7           Just briefly on the two cases they mentioned, *Executive*  
8 *Business Media* and *Carpenter*. Those are addressed at pages 9  
9 and 10 of our reply brief. We think they're clearly apposite  
10 because those involved substantive regulations and actions that  
11 changed people's rights. It didn't just say, "We're not going  
12 to enforce." Neither was a nonenforcement case.

13           In *Executive Business Media*, the government actually  
14 entered a settlement agreement that granted a no-bid contract  
15 to someone, and there were regulations that specifically said,  
16 "You have to follow competitive bidding rules."

17           Likewise in *Carpenter*, the government entered a settlement  
18 that granted a disputed property right to someone, and there  
19 were regulations that said, "You have to do other things when  
20 you're renting a property."

21           The relevant point here is that there's no regulation or  
22 statute that regulates how the government is going to enforce  
23 whatever the mandate may be. And so in that type of situation,  
24 when there's no law saying how the government or whether the  
25 government needs to enforce anything, there's just nothing for

1 the Court to review, and so that kind of decision is entrusted  
2 to executive discretion.

3                   **THE COURT:** So do you take the position that if three  
4 years from now there's new regulations that go back to the old  
5 paradigm that your client is inoculated by virtue of this  
6 settlement agreement?

7                   **MR. DICK:** Well, Your Honor, we take the position  
8 that the government agreed not to enforce, and we think that if  
9 the government did enforce it would be in violation of that  
10 agreement. And we would then fight with the government to  
11 enforce, and there would be a dispute.

12                  **THE COURT:** That is to say yes.

13                  **MR. DICK:** Yes, that would be a dispute about what  
14 the remedy is. That's the same with any type of settlement  
15 agreement private parties reach with the government all the  
16 time, and we're quite confident we would win in a dispute about  
17 that.

18                  **THE COURT:** Even if it was contrary to then existing  
19 rulemaking?

20                  **MR. DICK:** Right. Well, rulemaking is about the  
21 substantive law, not about whether the government is going to  
22 enforce. So there can be a rule that requires something, but  
23 the government may decide not to enforce that rule. And we  
24 think that this settlement agreement doesn't constrain the  
25 government in what kind of rules it makes, but it does

1 constrain the government from enforcing against the particular  
2 named parties here.

3           **THE COURT:** Right. Which is to say that if they  
4 change the rules in 2021, you won't have to follow them.

5           **MR. DICK:** That's our position, that the government  
6 would not be able to enforce them against us. We think the  
7 plaintiffs would have a right to bring a private cause of  
8 action.

9           **THE COURT:** Why were these settlements -- there is a  
10 backroom feel to this.

11           **MR. DICK:** Yes, Your Honor. We think the standard  
12 process was followed here, so two points on that.

13           One, the plaintiffs in those cases, who we don't --

14           **THE COURT:** I literally had no idea why these cases  
15 just kind of disappeared.

16           **MR. DICK:** Well, yes, Your Honor. So, again, on the  
17 two points. Number one, the plaintiffs had not intervened in  
18 this court. They had filed a motion to intervene, but they  
19 were not yet parties. So I'm talking about the Jane Doe  
20 intervenors.

21           **THE COURT:** Right.

22           **MR. DICK:** I don't mean to call them plaintiffs.  
23 They were not plaintiffs. They were not parties, and so there  
24 was no ordinary course in which they would have been part of  
25 those settlement negotiations for that reason.

1           In addition, because the settlement agreement did not  
2 affect their substantive rights, it only affected the  
3 government's decision whether or not to enforce, we don't think  
4 it had any impact on any third-party rights, so there was no  
5 reason to bring them in.

6           **THE COURT:** Why would the government have kept these  
7 quiet? That's what I don't understand.

8           **MR. DICK:** I'm not sure the government kept them  
9 quiet, Your Honor. You'll have to ask the government for why  
10 it proceeded in the way they did, but I don't think the  
11 government refused to provide them in FOIA. I think the  
12 government didn't put out a press release and say, here you go,  
13 but I think this was just done -- the justice department isn't  
14 necessarily in the process of publicizing all of these, and it  
15 was a settlement that settled out of court.

16           **THE COURT:** My experience is totally different from  
17 that. Boy, they send out press releases all the time notifying  
18 the public what's going on and what they're doing. But I will  
19 talk to your colleague here.

20           **MR. DICK:** Sure.

21           I just have one more brief point on RFRA, which is -- I  
22 want to emphasize why our primary RFRA argument here is  
23 entirely consistent with Your Honor's previous view of the  
24 accommodation, which is to say, even if you don't think the  
25 accommodation imposes a substantial burden, we don't think that

1 matters here because there's nothing in any statute that  
2 requires the accommodation to be imposed as a matter of  
3 regulation much less enforced against any particular party,  
4 right.

5         The accommodation was a completely discretionary executive  
6 regulation that came about in response to what was perceived as  
7 a substantial burden under the statute which the Supreme Court  
8 recognized in *Hobby Lobby*. The only statutory provision at  
9 issue is the provision that says preventative care has to be  
10 part of a health plan. *Hobby Lobby* says that can't apply to a  
11 religious objector, right. That's the statutory burden. And  
12 once that's true, once there's an exemption that RFRA requires  
13 from the statutory burden, which says you've got to provide  
14 this stuff as part of your health plan and pay for it, right,  
15 once there's an exemption required for that, the accommodation  
16 is just a discretionary tool that the executive may choose to  
17 adopt or may not choose to adopt.

18         But there's no colorable argument anywhere that the  
19 accommodation is somehow required by any statute, and therefore  
20 we don't see how it can be argued that giving an exemption from  
21 the accommodation in any way violates any statute because the  
22 accommodation is not required by anything in the first place.  
23 It is completely a discretionary tool.

24         So what the Supreme Court said in *Hobby Lobby* was, you  
25 know, there's this statutory requirement to provide the stuff

1 as part of your health plan and pay for it. That can't be  
2 enforced against a religious objector, and so there's a number  
3 of objective less restrictive means that the government could  
4 use.

5 One of those might be the accommodation. One of them  
6 might be to set up a different program where you subsidize  
7 contraception in some different way without having to get  
8 parasitic on the plan, on the health plan, of the religious  
9 objector at all. You could set up Title X clinics, and we  
10 think that's exactly what the government has done here.

11 And in particular, we think the only thing that they have  
12 identified as Notre Dame not providing, which is emergency  
13 contraception, this is the Plan B and ella, category of drugs  
14 that can cause the destruction of a fertilized egg, which some  
15 consider to be abortion, those are available at Title X  
16 clinics.

17 There's a Title X clinic three miles from Notre Dame's  
18 campus which anybody can go into. And on the website -- it's  
19 Olive Health Center -- it says, "We're not gonna turn away  
20 anybody that cannot afford these. Anybody can get these for  
21 free if they need them." And so we really, again, think  
22 there's no impediment to access because federal funds go to  
23 those Title X clinics.

24 It's like saying, you know, there's a liquor store down  
25 the street that anybody can go to and get something for free,

1       but we're, nonetheless, going to require a Baptist or a Muslim  
2       to provide liquor instead. We think there's a way to do this  
3       that respects the religious conscience of people who don't want  
4       to have any part in providing and have an independent clinic  
5       like that that's going to allow people to get access to it if  
6       they need it.

7           I think that conflict is especially irreconcilable. If  
8       you look at the *Zubik* oral argument, Your Honor -- I would just  
9       urge you if you haven't read that transcript -- I think the  
10      solicitor general, which was under the previous administration,  
11      made two key concessions there that seriously call into  
12      question. It did not concede the substantial burden under the  
13      accommodation for two reasons.

14           One of them was that as an ERISA matter, once the  
15      accommodation is invoked, the objectionable coverage is  
16      actually provided as part of the same plan as the sponsor.  
17      Because under a self-insured plan, the TPA has no authority to  
18      provide anything other than what the sponsor authorizes and no  
19      authority to provide anything other than as part of the plan.  
20      That's just a feature of ERISA law.

21           So at least for self-insured plans like Notre Dame's, you  
22      can't have a TPA providing something outside of that. So  
23      that's one point. That's actually part of the same plan, and  
24      we quoted that in our brief and cite to where the government  
25      admitted that.

1           And the second point is that --

2           **THE COURT:** There was an argument in the Ninth  
3 Circuit that they were explaining to the Ninth Circuit the  
4 exact opposite of that, that it is really a separate plan.

5           **MR. DICK:** That's certainly not the case for  
6 self-insured TPAs and --

7           **THE COURT:** No, they were saying for self-insured,  
8 like Notre Dame, where they have a TPA, that the TPA has to  
9 establish -- "plan" is a term of art.

10          **MR. DICK:** Correct.

11          **THE COURT:** But speaking pragmatically, a separate  
12 mechanism by which they provide this contraceptive wholly  
13 separate from the underlying insurer.

14          **MR. DICK:** Well, Your Honor, they call it separate in  
15 certain places, but if you look at the concession in the  
16 Supreme Court --

17          **THE COURT:** I will have to read that. I understand  
18 the point.

19          **MR. DICK:** -- it is part of the same plan.

20          **THE COURT:** I appreciate that.

21          **MR. DICK:** And the second thing is, as an ERISA  
22 matter, also a third-party administrator is not authorized to  
23 provide any coverage that the plan sponsor itself does not  
24 effectively say is okay, does not authorize. And so that's why  
25 unless the University files the self-certification or the

1 notice that the regulations require, the TPA literally will not  
2 have any authority or any obligation to provide that coverage,  
3 right.

4 If Notre Dame just sat on its hands --

5 **THE COURT:** This is the trigger point.

6 **MR. DICK:** Correct.

7 And Your Honor's previous opinion said the TPA is required  
8 to provide the coverage regardless. Respectfully, that's just  
9 incorrect as a matter of law because the TPA only acts as an  
10 administrator, only provides the coverage that the University  
11 says, "Here is the menu of our plan, TPA now provide it."

12 And so there's no obligation on the TPA, for example, just  
13 under the regular statutory mandate. There's no obligation on  
14 the TPA. There's an obligation on the plan sponsor, on Notre  
15 Dame, to include this coverage as part of its plan; but if  
16 Notre Dame said, "no" and sat on its hands, it would get hit  
17 with massive penalties, nobody would provide the coverage, and  
18 that's why we think it is really a trigger, and forcing Notre  
19 Dame to do that really does make a difference whether it's  
20 provided or not.

21 Your Honor, if there's no further questions, that's all I  
22 have today.

23 **THE COURT:** Thank you.

24 **MR. DICK:** Thank you very much.

25 **THE COURT:** Just a couple of minutes because I do

1 have to run here, but I don't want to cut you off too much.

2           **MS. KOPPLIN:** Well, thank you, Your Honor, and I will  
3 try not to belabor anything you've heard a lot about already  
4 but there are a couple points that I wanted to make.

5           **THE COURT:** Sure.

6           **MS. KOPPLIN:** Just going in the same order that  
7 plaintiffs went, starting with the settlement agreement. I  
8 mean, as you just heard from Notre Dame and from us, it's now  
9 very odd because plaintiffs are, essentially, taking an  
10 interpretation of the settlement agreement that the parties  
11 don't take, that is, that it has some effect on individual  
12 substantive rights and then asking you to overturn it on that  
13 basis. And it's also just against a clear reading of the text.

14           They read you from paragraph 2. The key language in  
15 paragraph 2 is that the government will treat plaintiffs and  
16 their health plans, et cetera, et cetera, et cetera, as exempt.  
17 Everything that follows and the letters after paragraph 2 is  
18 sort of a definition of what the policies are that it's going  
19 to treat them as exempt from. But that's the key kernel here,  
20 is that what the government is going to do under the settlement  
21 agreement is going to treat the signatories as exempt from  
22 these certain policies. So this has no effect on any other  
23 private party's rights. Whether they have them or they don't,  
24 that remains the same before and after the settlement  
25 agreement. That's not being changed.

1       There was some discussion of the fact that this is also a  
2 prospective agreement, that it's forward-looking. Without  
3 going too far into that, I'll just say this whole question of  
4 what kind of a bargain was made to reach the settlement, what  
5 kind of things that both sides agreed to give up -- I mean,  
6 obviously, it's a better bargain to offer if you say, "I will  
7 not enforce this against you for one week versus I will not  
8 enforce this against you for a month versus if we create a new  
9 rule next month will I enforce that rule against you," that  
10 that question of what was kind of brought to the table on both  
11 sides is one that for the reasons previously discussed should  
12 be committed to the executive branch's discretion in how to  
13 settle a case, that kind of thing.

14           **THE COURT:** What did the government get out of the  
15 settlement agreement?

16           **MS. KOPPLIN:** The end of the litigations.

17           **THE COURT:** Oh, really?

18           **MS. KOPPLIN:** Well, with -- it's the suits -- the  
19 listed suits brought by Notre Dame and the other signatories of  
20 the settlement agreement.

21           **THE COURT:** There's no end to this. You didn't get  
22 anything that you bargained for in that regard. I mean, you've  
23 said that -- seriously -- that you guys wanted to buy peace.  
24 That's nonsense. That's complete nonsense. That's why we're  
25 here.

1                   **MS. KOPPLIN:** Well, in light of what a mess this has  
2 become, I mean, I will just say, we see that as support for our  
3 argument about why the agencies need additional leeway in  
4 dealing with RFRA, because of the sort of impossibility of  
5 threading a needle.

6                   **THE COURT:** Wouldn't it be easier to get this through  
7 Congress? I mean, that's the real answer.

8                   **MS. KOPPLIN:** Just moving on from that, this case is  
9 so different than the cases that plaintiffs cite like *Executive*  
10 *Business Media*. In *Executive Business Media*, there was a  
11 regulation that told the government, "Only assign these  
12 contracts through a competitive bidding process," and the  
13 government tried to enter into a settlement agreement but said,  
14 "We're going to give you a contract without any competitive  
15 bidding."

16                  There's no analogous provision here, which would be if the  
17 plaintiffs found something in the ACA that said, "Okay,  
18 government, don't settle any cases in a way that lets people  
19 not provide contraceptive." There's just no such command about  
20 how the government should settle litigation, and those cases  
21 are all persuasive only, and so the Court should just consider  
22 for whatever (indiscernible) discourse they have, which we  
23 don't think is very much.

24                  Finally, plaintiffs in the settlement agreement suggest  
25 that there's some kind of usurpation happening of the executive

1 function. I think it's actually quite the opposite. I mean,  
2 we cited a number of statutes in our brief that give discretion  
3 for controlling litigation on behalf of the United States to  
4 the Attorney General, and I think as you alluded to, that's  
5 part and parcel of it, is the decision when to settle  
6 litigation and that's part of the separation of powers in the  
7 other direction. The president, who's elected by the people,  
8 gets to select the Attorney General, and that's the way that  
9 this process will be managed, not through the courts.

10 And I think at the very end of the settlement agreement --  
11 I still don't understand necessarily --

12 **THE COURT:** I totally agree with you on that. That's  
13 an important point. But where it falls off the wagon is if,  
14 you know, the White House changes again in 2021, you've  
15 effectively prevented -- and the rules change again -- you've  
16 effectively prevented these students and these folks from  
17 benefiting from those new rules by virtue of the way it's been  
18 settled.

19 I mean, am I wrong on that?

20 **MS. KOPPLIN:** I mean, I don't want to go too far into  
21 a hypothetical, what might happen in 20 years and what  
22 regulations might exist then and who would be enforcing them  
23 against --

24 **THE COURT:** I'm just responding to your point -- and  
25 I accept it and totally agree with it, by the way -- that

1       that's the way the system works. But why should it work  
2       prospectively like that? That's troubling to me.

3                   **MS. KOPPLIN:** I mean, I guess I'll just say I don't  
4       know too much about these issues. I think they're also a  
5       little bit above my pay grade, but we discussed earlier these  
6       internal DOJ guidance that the plaintiffs brought in. And I  
7       think we're kind of on the same page. They're not really  
8       binding. But I will just say the concerns that you mention are  
9       some of the same concerns that are discussed there, so it's not  
10      that DOJ doesn't have guidance on this. But as I mentioned,  
11      DOJ has a process, and that process allocates discretion to  
12      various people to make exceptions and to decide how to pursue  
13      its objectives, and that process was followed here.

14                  The last thing I'll say about the settlement agreement is  
15       just that I think actually on the merits their arguments that  
16       the settlement agreements violate the constitution or violates  
17       the ACA are actually exceptionally weak for the same reasons we  
18       discussed and for the kind of additional reason that the  
19       settlement agreement is just a very strange vehicle.

20                  She mentioned regarding the Equal Protection Clause you  
21       can discriminate against a class of one. Sure, you can  
22       discriminate against a class of one. My point was more I've  
23       never heard of an equal protection case where the class was  
24       sort of everyone who signed the settlement agreement is the  
25       classification that we're using.

1       Turning to the final rules. On the procedural point about  
2 how the final rules were entered into, I think the key question  
3 that you asked was, "Well, what were the agencies supposed to  
4 do then?" And I heard plaintiffs to say that the agencies  
5 should have invalidated the IFRs and then began again. There's  
6 several problems with this.

7       The first and the biggest problem is that has no source in  
8 the APA. The APA contains no such requirement like "Thou shall  
9 then invalidate this IFR" and then go forward. And *Vermont*  
10 *Yankee* says there is no federal common law for the APA. So if  
11 it's not in the APA, the Court should not be imposing those  
12 restrictions on the agencies.

13       Finally, here, as a logical matter, the IFRs have been  
14 enjoined nationwide several times over at that point, so it's  
15 not clear what effect it would have had for the agencies to  
16 also say, "Okay, we're also going to invalidate them." They  
17 were governing no one at the time that these comments were  
18 being considered and at the time that the agencies were doing  
19 this.

20       And the last thing I will point out on this question of  
21 how the agencies considered the comments, in addition to the  
22 fact that the *Steel Corps* case really is on point here. It's a  
23 different statute, but it really is the same analysis of what  
24 do we look at to see whether or not the agencies considered  
25 comments. And the conclusion is that seeing their responses of

1       the comments were written into the final rule is probably  
2       enough.

3           But the final point is that the Eastern District of  
4       Pennsylvania case, which that opinion, the most recent one,  
5       plaintiffs generally like it a lot, and the judge did not agree  
6       with the government on very many points, but she did agree with  
7       us that the agencies were likely to show that they had  
8       successfully considered all of the comments when they went back  
9       to do the final rule. So we think that's actually a really  
10      important point, and the fact that she reached that conclusion  
11      should carry a lot of weight.

12           Turning to the substantive issues about the rules. It's  
13      strange because plaintiffs are talking a lot like the church  
14      exemption and the accommodation just don't exist. And the  
15      authority for those has to come from somewhere. And the  
16      question is, if it doesn't come from the ACA and it doesn't  
17      come from RFRA, then where would it possibly come from?

18           I think I hear them to suggest now that this is somehow  
19      related to *Amos*, but that really doesn't make sense. In *Amos*  
20      the Supreme Court was analyzing a statute that exempted  
21      churches from Title VII to see if that statute satisfied the  
22      establishment clause. So it's not that *Amos* would provide any  
23      separate authority somehow for entering into an exemption.

24           And on this question of our interpretation of the statute,  
25      the language that was given to HRSA and to HHS was very broad,

1 and I don't think it's unusual to think that Congress would  
2 have expected some kind of religious exemption to be made,  
3 especially because the topic is contraception. And  
4 contraception is an area where there are a number of exemptions  
5 and a number of religious accommodations. There's the Hyde  
6 amendment, there's the Church amendment, and now, I mean, the  
7 one named for Frank Church, not the one we are talking about  
8 with the churches and integrated auxiliaries.

9 It's just an area where Congress may have had a background  
10 expectation, and it seems strange to me to suggest that our  
11 interpretation is foreclosed and that Congress could never have  
12 considered the agencies would be able to allow religious  
13 exemptions here. I think if the provisions were more specific,  
14 maybe plaintiffs would have more of a point, but I think it's  
15 kind of the opposite too in that if Congress had actually been  
16 listing specific contraceptive services, Congress had been  
17 listing, okay, sterilization services, that might have caused  
18 Congress to pause and talk about religious exemptions itself  
19 instead of just kind of saying, "Okay, this whole ball of wax,  
20 HRSA, is for you to figure out."

21 Plaintiffs, of course, note that Congress rejected a  
22 Congress amendment, but we don't know which way that cuts.  
23 It's hard to draw any conclusions from that. Perhaps Congress  
24 rejected it because they wanted to see what HRSA was going to  
25 do. Perhaps Congress rejected it because they knew, hey, we

1 have RFRA, which is this background norm telling the agencies  
2 not to violate -- not to impose substantial burdens on  
3 religious practice without a compelling reason, so we just  
4 don't really know what intent from Congress to draw from that.

5 Turning to RFRA. There is a lot of discussion of the past  
6 cases here and before the Seventh Circuit. Now, of course  
7 those cases at the Seventh Circuit were ultimately vacated, and  
8 the entire chain was done on a pretty thin record. I just -- I  
9 don't think it's quite as overwhelming as plaintiffs think it  
10 is, especially since both the Seventh Circuit opinions were a  
11 2-1 decision with a dissent.

12 Plaintiffs also are now trying to draw in cases from the  
13 Third Circuit like this *Real Alternatives* case. That case does  
14 not say what plaintiffs say it says. It did not reaffirm the  
15 prior holding. The part the plaintiffs are talking about is  
16 actually dicta because the most recent version was not about  
17 whether or not an employer was substantially burdened, so the  
18 Court just couldn't have reached any holding about whether or  
19 not employers were substantially burdened in that case, and, of  
20 course, it's another out-of-circuit case.

21 Finally, just briefly turning to the constitutional  
22 claims. I think I'll just rely on what we previously said as  
23 far as due process and equal protection goes, but to address  
24 the Establishment Clause, they discuss here some of these  
25 alleged burdens on third parties.

1       Certainly, we agree that the Establishment Clause is a  
2 limitation the government has to follow. But the Supreme Court  
3 has shown that there is a space in between the Establishment  
4 Clause and the ability to accommodate religious beliefs, and  
5 many of these accommodations that the Supreme Court has given  
6 the okay to in the past impose some burdens on third parties.  
7 It cannot be the case that there can be no incidental effect on  
8 someone else.

9       Every time, let's say, that a church entity is given a tax  
10 exemption, those taxes are collected from someone else, or  
11 every time a church is allowed to fire its building engineer as  
12 in *Amos*, that's an individual who was burdened by that  
13 decision. And all of the same reasons that applied in *Amos*  
14 also applied here.

15       The Supreme Court said -- I think in footnote 15 -- it's  
16 not really that the government is directionally burdening that  
17 individual; it's that the government is removing its regulation  
18 and allowing the church to decide what to do with him.

19       It's the same thing here. The government is not  
20 directionally burdening any woman's choice to use  
21 contraceptives; it's just narrowing the burden that it places  
22 on employers to provide subsidies for them.

23       So similarly, I think plaintiffs say that Notre Dame has  
24 gotten some kind of a new right here that no one else is  
25 getting, but this is exactly like every other religious

1 accommodation. The Supreme Court in *Amos* says it's not that  
2 we're giving religion some kind of a new right to discriminate;  
3 we're just removing the government burden that was placed on  
4 them.

For those reasons, we would ask that you dismiss, and  
that's all that I have. Thank you.

7                   **THE COURT:** All right, guys, I will take this under  
8 advisement. I'm going to get an opinion out to you as quickly  
9 as I can. I can't promise -- I have a lot to unpack here. I  
10 do very much appreciate the excellent advocacy.

11 || Thank you.

12 MS. BANKER: Thank you, Your Honor.

13 (A recess was had at 12:34 p.m.)

14 \* \* \*

15 (End of requested transcript.)

## CERTIFICATE

17 I, Stacy L. Drohosky, certify that the foregoing is a true  
18 and correct transcript from the record of proceedings in the  
19 above-entitled matter.

20 Date: August 20, 2019

S/Stacy L. Drohosky  
S/STACY L. DROHOSKY  
Court Reporter  
U.S. District Court

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